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Children's Rights in International Commercial Surrogacy

Exploring the challenges from a child rights, public international human rights law perspective

C. ACHMAD

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Claire Achmad
Te Whanganui-a-Tara, 2018

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1 Introduction

> 'We may at the outset point out that a lot of legal, moral and ethical issues arise for our consideration in this case, which have no precedents in this country. We are primarily concerned with the rights of two new born innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova.'
>
> – *Jan Balaz vs Anand Municipality and 6 ors, 2009*[1]

1 International Commercial Surrogacy as a 21st century phenomenon

International Commercial Surrogacy (ICS) has developed over the past decade as a distinct method by which to have a child. Prior to this, it would have been hard to fathom the possibility – let alone the practical reality – of a child being born using an embryo created from the sperm of an anonymous Scandinavian donor and the egg of an anonymous Ukrainian donor, implanted into an Indian surrogate mother, intended for the care of 'commissioning parents' living in New Zealand. Now however, families are being built in new ways, and those wishing to become parents may turn to ICS to do so. For some commissioning parents, (such as those who have been unable to conceive via other assisted reproductive technology (ART) methods), ICS is an option of last resort. For others though (such as same-sex couples and persons without a partner), it is sometimes viewed as an attractive first option. The observation of the Gujarat High Court quoted above in its judgment in *Jan Balaz v. Anand Municipality and 6 ors* highlights the unprecedented nature of the scenarios arising through ICS, and emphasises the people who are at the heart of all ICS situations: the children conceived and born this way. Children conceived and born through ICS are rights holders,[2] like all other children. They are entitled to the full range of rights guaranteed under the United Nations Convention on the Rights of the Child, and as such are owed special protection by states

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1 *Jan Balaz v. Anand Municipality and 6 ors*, AIR 2010 Guj 21, Gujarat High Court, 11 November 2009, at [9].

2 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, CRC/C/GC/14, 2013, at [16(b)].

and other duty-bearers, such as parents.[3] However, conception and birth through ICS can lead to this group of children facing particular challenges to their rights. This study therefore focuses on this subject and how to address these challenges, to protect and uphold child rights in ICS.

ICS can be defined as the practice of a person or persons ('commissioning parents') living in one state paying to have a child who is intended for them upon birth, and who is conceived (usually in-vitro) and born in another state[4] to a woman acting as a surrogate. It is distinctive in its cross-border nature and the reality that commissioning parents are highly likely to intend to bring up the child in their own home state,[5] commissioning parents often wanting to remove the child from his or her state of birth shortly following birth. As Bromfield and Robati note, ICS arrangements are "almost always gestational surrogacy arrangements",[6] meaning that it is unlikely the surrogate mother is genetically related to the child she bears. The Permanent Bureau of the Hague Conference on Private International Law (Permanent Bureau) provides a simplified description of international surrogacy arrangements as being "any surrogacy arrangement involving more than one State, either as a result of the differing residences (and usually, nationalities) of the intending/commissioning parents and surrogate mother, or otherwise."[7]

The Permanent Bureau's definition of international surrogacy arrangements does not refer to the presence of a commercial element. In practice however, many international surrogacy arrangements have a commercial element beyond what might be seen to be 'reasonable costs' associated with a surrogacy in a traditional, altruistic sense.[8] It is for this reason that this study focuses on ICS,[9] with altruistic surrogacy falling out of scope. ICS leverages off globalisa-

3 R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child,* (3rd ed.), UNICEF, 2007, at 1.

4 The 'supply-side state'.

5 The 'demand-side state'.

6 N.F. Bromfield and K.S. Rotabi, 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations', (2014) 1(3) *Global Social Welfare,* at 124.

7 Permanent Bureau of the Hague Conference on Private International Law, Private International Law Issues Surrounding the Status of Children, Including Issues Arising From International Surrogacy Arrangements (Preliminary Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference), (2011), at 3 fn 1.

8 In some states in which commercial surrogacy is illegal but which allow altruistic surrogacy, intending parents are permitted to compensate altruistic surrogates for reasonable costs associated with the surrogate's pregnancy. E.g. Section 7, Surrogacy Act 2010, New South Wales (Australia); Section 14(4), Human Assisted Reproductive Technology Act 2004, New Zealand; Section 11, Surrogacy Act 2010, Queensland (Australia); Section 54(8) Human Fertilisation and Embryology Act 2008, United Kingdom.

9 Indeed, e.g. in the UK, despite the standard of 'reasonable expenses' for altruistic surrogacy under UK legislation, the Family Division of the High Court has retrospectively authorised payments in ICS cases which go far beyond the traditional conception of reasonable

tion, technological advances, and cheaper ART and surrogacy services offered by 'supply states' which have predominantly grown in less-developed states in the past decade (existing alongside the availability of ICS in some states of the United States of America,[10] the cost of which is markedly greater[11]). ICS has also developed as a reaction to the reality that even in states where altruistic, non-commercial surrogacy is legal, it is still difficult to find women who are willing to act as surrogates purely on a gift-relationship basis.[12] These various factors have combined with attitude shifts about how we build and form families and what 'family' means in the 21st century. Indeed, creating a family through alternative methods such as ICS has become increasingly acceptable in some societies. It is in the context of 21st century connectivity and globalisation that the broader growth of medical tourism and the outsourcing of labour have also occurred and are broadly accepted; more people than ever before cross international borders for medical procedures far from home[13] and labour is increasingly outsourced to locations and people geo-

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expenses, and where there was a clear commercial element involved: in *J v. G* [2013] EWHC 1432, a payment of USD $56,750 was authorised (at [14]). Mrs Justice Theis held that the payments "were not so disproportionate to expenses reasonably incurred that the granting of an order would be an affront to public policy." (at [22(1)]); in *Re X (Foreign Surrogacy – Child's Name)* [2016] EWHC 108 (Fam), a payment of USD $48,332.49 was authorised, with Mrs Justice Theis holding that "In the circumstances of this case the payments made other than for expenses reasonably incurred should be authorised by the court." (at [28])

10 For discussion of the approaches of different states in the United States, see J.L. Watson, 'Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated for Their Services?', (2007) 6(2) *Whittier Journal of Child and Family Advocacy*, 532-539.

11 For discussion of the comparative costs between surrogacy in the United States and other countries such as India, see: N. Grether and A. May, 'Going global for a family: Why international surrogacy is booming', *Al Jazeera America,* 12 May 2014, available at: http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/12/going-global-forafamilywhyinternationalsurrogacyisbooming.html (accessed 16 July 2016); D. Cunha, 'The Hidden Costs of International Surrogacy', *The Atlantic,* 22 December 2014, available at: https://www.theatlantic.com/business/archive/2014/12/the-hidden-costs-of-international-surrogacy/382757/ (accessed 16 July 2016). For discussion of the comparative payments received by surrogates in the United States and India, see R. Deonandan, 'Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy', *Risk Management and Healthcare Policy* (2015), available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4544809/ (accessed 16 July 2016).

12 E.g. in New Zealand, as discussed in: M. Duff, 'Who is my egg mother?', *The Dominion Post,* 12 October 2014, available at: http://www.stuff.co.nz/dominion-post/culture/10607436/Who-is-my-egg-mother Tombleson also argues that "The prohibition of commercial surrogacy is largely responsible for reproductive travel as it reduces the number of women within the domestic sphere willing to partake in the practice." A. Tombleson, *Contracting the New Delhi Belly: Responding to the Practice of International Surrogacy*, dissertation submitted in partial fulfilment of a Bachelor of Laws (Honours) degree, Faculty of Law, University of Otago, October 2012, 5.

13 For comprehensive discussion regarding the growth of medical tourism, see J. Connell, *Medical Tourism* (2011), at 42-60.

graphically distant from the customer or end user.[14] The nature of this supply and demand relationship, with demand flowing predominantly from the more developed world to the supply-side located in the less developed world can create underlying power imbalances and issues around relative ability to access services.[15] A number of factors motivate people to engage the services offered through medical tourism, including but not restricted to competitive pricing, on-demand availability, and to circumvent restrictive laws and policies of the state in which they reside and access procedures not available there.

The last of these factors is particularly significant regarding ICS, as commissioning parents often turn to ICS when they have exhausted all options for family building in their home state and when that state does not allow commercial surrogacy. Moreover, in instances where one or both commissioning parents are able to provide gametes for use in the ICS arrangement, the opportunity of creating a child with whom they will share a genetic link is a strong motivator towards ICS. Therefore, ICS can be viewed as a very specific subset of the wider growth in medical tourism, markedly different from other procedures accessed through medical tourism, because ultimately, it leads to a child.

It is the child – who is at the centre of all ICS arrangements – with whom this study is concerned, from a human rights perspective. Over the course of this study (between 1 January 2012 and 31 July 2016), ICS has continued emerging as a dynamic and multifaceted 21st Century human rights challenge. This is despite some significant changes having occurred in the ICS landscape since work on this doctoral study commenced. For example, some states – such as Thailand – have come full-circle with ICS during this time, having emerged as a primary ICS supply state and then legislated to outlaw and criminalise ICS within its jurisdiction.[16] Other major ICS states – such as India – have banned ICS in practice through issuing policy directives,[17] while draft legislation to effect such a ban in law awaits final legislative approval and assent.[18] Many other states – on both the supply and demand sides of ICS – are continuing to grapple with the challenges arising from ICS, including the situation of children born through ICS arrangements. Therefore, this study is highly relevant to the present-day context around the world. As has been

14 I. Bantekas and L. Oette, *International Human Rights Law and Practice* (2013), at 703-705.

15 *Ibid,* at 703.

16 See Protection for Children Born From Assisted Reproductive Technologies *Act*, B.E. 2558 (2015), available at http://www.senate.go.th/bill/bk_data/73-3.pdf ; unofficial translation available at https://tinyurl.com/yc2pgrra

17 The Indian Ministry of Home Affairs issued a directive on surrogacy in November 2015 stating that foreign nationals are not allowed to commission surrogacy in India. See http://boi.gov.in/content/surrogacy (accessed 29 July 2016).

18 See The Surrogacy (Regulation) Bill, 2016 (India, Bill No. 257 of 2016), available at http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf; and for information on progress of the Bill through the legislative process: http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/

demonstrated through ICS situations which have come to light through domestic courts, regional human rights courts and the media, children conceived and born through ICS remain particularly vulnerable. Such cases have involved children being left stateless, discriminated against, trafficked and sold, abandoned without a family environment, without legal parentage, and unable to preserve their identity. This study explores the child's rights impacted by these realities and the associated implications for the child's best interests, whilst acknowledging the "indivisible, interdependent and interrelated nature of children's rights."[19]

2 Aims of the Study and Research Questions

This study proceeds from the hypothesis that children are particularly vulnerable to having their rights endangered as a result of being conceived and born through ICS. Despite the fact that all ICS arrangements are centred on producing a child, when work on this study commenced, no academic scholarship existed focusing on the child in ICS from a predominantly child rights perspective. Now, at the time of writing this Introduction to the study in 2016, ICS has received increased academic attention drawing on the international human rights and child rights framework, albeit often through a different legal lens, for example comparative law,[20] private international law,[21] and European law.[22] The work presented in this study has therefore been at the forefront of considering the situation of children in ICS from a child rights perspective under public international human rights law, and is a fresh and novel body of work in this respect.

The aims of this study are four-fold: first, to place focus on the child and their rights in ICS, and thereby contribute to filling the gap identified in scholarship; second, to explore and better understand the ways in which the child is vulnerable and how child rights are at risk and endangered in ICS; third, to provide insight into how the public international human rights law frame-

19 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, CRC/C/GC/14, 2013, at [16(a)].

20 E.g., see M. Wells-Greco, *The Status of Children Arising from Inter-Country Surrogacy Arrangements* (2015).

21 Y. Margalit, 'From Baby M to Baby M(Anji): Regulating International Surrogacy Agreements' (2015), available at: http://portal.idc.ac.il/he/lawreview/conferences/documents/2015-margalit.pdf (accessed 13 July 2016); and S. Mohapatra, 'Adopting an International Convention on Surrogacy – A Lesson from Intercountry Adoption', (2016) 13(1) *Loyola University Chicago International Law Review,* 25.

22 N. Koffeman, *Morally sensitive issues and cross-border movement in the EU: The cases of reproductive matters and legal recognition of same-sex relationships* (2015); and K. Trimmings and P. Beaumont, 'Parentage and Surrogacy in a European Perspective', in J.M. Scherpe (ed.), *European Family Law: Family Law in a European Perspective* (2016), Vol. 3, at 232-283.

work, especially the United Nations Convention on the Rights of the Child (CRC)[23] provides a protective framework for children conceived and born through ICS, and how this can be harnessed to ensure children can exercise and enjoy their CRC rights, regardless of their conception and birth through ICS; and fourth, to provide practical suggestions for how the child and their rights can be better protected in ICS. The research questions addressed in this study are as follows:

Main research question

> What is the role of international human rights law (especially the norms and standards established by the CRC) in protecting and reinforcing the rights of children in ICS, and how should the rights of children involved be understood and approached from a public international human rights law, child rights perspective in relation to other ICS parties and rights-holders?

Subsequent research questions

a) How does ICS present a challenge to children's rights?
b) What rights of the child are most at risk in ICS?
c) How can international human rights law norms and standards (especially those established by the CRC) be utilised to protect the rights of children in ICS situations?
d) How should the various competing rights and interests of children and others in ICS situations be balanced using an approach consistent with, and drawing on, public international law human rights norms and standards?

3 Rationale for a focus on the rights of the child

As already noted, this thesis seeks to fill a gap in scholarship on ICS by placing a clear focus on the child in ICS, from a child rights perspective. The hypothesis that the child is particularly vulnerable in ICS deserves in-depth exploration and analysis – as provided in this thesis – in order to understand why the child is vulnerable and the nature of that vulnerability from a rights perspective. As Biggs and Jones observe, "Vulnerability may stem from particular types of social disadvantage, based on factors such as young or old age, illness, disability and poverty. [Vulnerability is] experienced differently according to each individuals' personal circumstances. Vulnerability is therefore defined

23 1989, United Nations Convention on the Rights of the Child, 1577 UNTS 3.

in a variety of ways depending on the context."[24] The contextual nature of vulnerability is certainly apparent in ICS, with each and every ICS arrangement presenting different circumstances depending on factors such as which states are involved on the supply and demand sides (and therefore, what domestic laws and policies apply), the genetic make-up of the child, and the actions of the commissioning parents and surrogate. However, the very fact of a child's deliberate conception and birth through ICS does raise a number of potential risks to their rights, thereby heightening their vulnerability regardless of the nuances of the specific contextual factors at play in any one ICS arrangement. Children conceived and born through ICS appear to fit within Diver's concept of being potentially "uniquely disadvantaged"[25] by virtue of their conception and birth via this method of family building (Diver uses the concept of unique disadvantage to describe genetically kinless persons). Therefore, a specific focus on the child and their rights situation is necessary and warranted, especially as children are continuing to be born through ICS and therefore born into situations of heightened vulnerability. This underscores the continuing relevance of this study and its findings and recommendations.

Although placing its central focus on the child and their rights in ICS, this study acknowledges the potential vulnerability of other parties involved in ICS, such as the women who act as surrogates and the commissioning parents. In the less-developed states where ICS supply has emerged over the past decade (for example, India), it is often economic impoverishment that drives their involvement in ICS due to a lack of economic alternatives.[26] This also opens them to the possibility of being taken advantage of by political and market forces and the associated demands of commissioning parents.[27] Surrogates' vulnerability to having their rights and interests endangered is touched on at various points throughout this thesis, within the context of and in relation to the child's rights situation. Therefore, this study is intended to be complementary to pre-existing research and literature concerning the rights of other parties to ICS arrangements. The primary focus rests on the child and their rights given the child's absolute lack of personal agency in comparison to other parties to ICS arrangements, owing to their stage of life. This is especially the case for children in their infancy in the months and years immediately following their birth through ICS, when many actions and decisions concerning their

24 H. Biggs and C. Jones, 'Legally Vulnerable: What is Vulnerability and Who is Vulnerable?', in M. Freeman, S. Hawkes and B. Bennett (eds.), *Law and Global Health: Current Legal Issues* (2014), Vol. 16, at 133-134.

25 A. Diver, *A Law of Blood-ties: The "Right" to Access Genetic Ancestry* (2014), at 83.

26 E.g. see A. Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India,* (2014), at 9; and N. Witzleb and A. Chawla, "Surrogacy in India: Strong Demand, Weak Lives", in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015), at 189.

27 For discussion, see S. Allan, "The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations", in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015), at 125-126.

rights are taken which have a potential life-long impact for them as they grow up and reach adulthood. By placing central focus on the child's rights at stake in ICS, this study serves to highlight the situation of the child in ICS.

4 Methodological approach and scope

This study has been conducted between 01 January 2012 and 31 July 2016. This study focuses on the child's situation in ICS through a public international law framework, taking a child rights, legal theory based approach. This approach has been selected to ensure attention is adequately placed on the child's rights in ICS, in relation to the international human rights standards and norms established under the CRC and other relevant international human rights law instruments. Although private international law issues are briefly touched on throughout the thesis (out of necessity, given the conflict of domestic laws arising in ICS), this study does not take a private international law, family law or contract law lens to the child's situation in the ICS context. Doing so would detract from the aims of the study and the core focus on the child's human rights situation and the focus on public international human rights law norms and standards as the foundational, underpinning protection framework for approaching the child's situation in ICS. It is for this reason that this study does not focus on legal parentage as a central issue and this thesis does not have a chapter focussing solely on legal parentage in ICS, given that legal parentage is predominantly a private international law matter in this context. However, legal parentage is dealt with from a child rights perspective where relevant throughout the thesis, given its interface with the child's rights situation in ICS.

The CRC is the most widely ratified international treaty, with near universal coverage.[28] Like other public international human rights law treaties, realisation of the rights of rights-holders (in the case of the CRC, children's rights) is reliant on CRC duty-bearers fulfilling their associated duties and obligations.[29] Although States Parties are the principal CRC duty-bearers, the responsibilities and obligations for exercising duties under the CRC are not limited to States. Making the CRC real in practice for children also relies on other non-state actors, such as parents, families, communities, civil society and private actors fulfilling their responsibilities and obligations under the

28 At the time of writing, the United States of America is the only state that has not ratified the CRC. See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (13 July 2016).

29 For discussion, see J. Tasioulas, 'Protecting Human Rights: On the Role and Duties of Duty-Bearers', *ABC,* 28 June 2017.

CRC, as secondary duty-bearers.[30] The CRC is, however, as Detrick explains, "unique, because it protects the broadest scope of fundamental human rights ever brought together within one treaty – economic, social and cultural, and civil and political".[31] The CRC is the public international law instrument forming the backbone of the legal framework that this study utilises as its main point of departure, as well as referring to other public international sources of law (both hard and soft) where relevant. The study draws on the work of the CRC Committee and other human rights treaty bodies, existing legal academic scholarship generally relating to children's rights, as well as scholarship specifically dealing with international surrogacy (an emerging body of scholarship over the period of time this study has been undertaken), and relevant reports and media publications regarding ICS. Although classical legal research forms the primary methodology of this study, multidisciplinary sources have been consulted where relevant, including from the disciplines of anthropology, social work and psychology. The legal, jurisprudential and other sources on which this study is based have been accessed via extensive research through digital platforms and databases, and by working with a range of texts in research libraries primarily in the Netherlands and New Zealand (with some research also conducted in research libraries in wider Europe, Australia and the United States). The study is also generally informed by the author's own professional experience as a lawyer working on cases of ICS in New Zealand[32] and through engaging in and presenting papers at expert dialogues, conferences and workshops on international surrogacy around the world throughout the course of this study.[33] Undertaking this study as a thesis by articles (explained further in Section 6 of this introductory chapter) has enabled the chapters which are now presented in this doctoral thesis to be relevant and

30 For a useful overview, see European Commission, *EU Commitments in the Field of Child Rights: Rights Holders and Duty Bearers,* https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/2.8.html.

31 S. Detrick (ed.), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (1992), at ix.

32 Including for the New Zealand Government as in-house legal counsel for the Ministry of Social Development.

33 International Workshop: National Approaches to Surrogacy, University of Aberdeen, Scotland, August-September 2011; Reconstructing and Deconstructing 'Mother' Workshop, Columbia University, United States of America, April 2012; World Social Work and Social Development Conference, Sweden, July 2012; International Adoption and Surrogacy Conference, New Zealand Law Society, New Zealand, April 2014; Global Forum on Statelessness, UNHCR and Tilburg University, The Netherlands, September 2014; International Conference on Surrogacy and Human Rights, School of Law, ITM University, India, November 2014; 25 Years of the UN Convention on the Rights of the Child Conference, The Netherlands, November 2014; Crossing Boundaries: Reproductive Travel in Asia, La Trobe University & La Trobe Asia, Australia, December 2014; Redefining Family Conference: Growing Families Through Adoption, Donor Conception and Surrogacy, Auckland University of Technology, New Zealand, January 2016.

have a practical application and influence in 'real-time', over the course of time that the study has occurred.

As ICS is a phenomenon with a global dimension, a global perspective is important when examining it from a child rights, legal perspective. Therefore, this study takes a wide-ranging, international approach to the cases of ICS it highlights, while choosing to focus particularly on a) ICS cases occurring in jurisdictions where ICS supply has developed rapidly over the past decade in the context of little or no domestic legislation or policy governing ICS; and b) ICS case law that has emerged in response over the past decade in domestic courts in ICS demand jurisdictions. The selection of case law focused on throughout the thesis is restricted, for practical reasons, to cases where English judgments or case reports in English have been available. It should also be noted that given the dynamic and emerging nature of ICS as a phenomenon, over the course of the study, the pace at which ICS case law has developed in different jurisdictions has varied. Recognising this reality, in order to remain responsive, relevant and engaged with the limited number of leading ICS cases which have emerged over the course of this study, some leading cases outside of the primary selection criteria are dealt with in the thesis. Case law analysis throughout the thesis elucidates particular child rights issues and challenges in ICS, intended to provide a sense of the issues both domestic and regional courts are contending with in practice when dealing with ICS, and the jurisprudential approaches adopted.

In the absence of being able to directly incorporate the voices of children born through ICS given their current young age, this study aims to bring a strong child-centred perspective to the study of ICS by maintaining a clear focus on the rights of the child most at risk in ICS, to highlight them so that they can be addressed through future approaches to ICS at the legislative and policy levels, both internationally and domestically.

From a methodological and scope perspective, this study does not explore in-depth whether ICS amounts to the sale of children. The definition of the sale of children is broad under international human rights law, established under Article 2(a) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.[34] Therefore, it is important to acknowledge at the outset of this study that strong arguments exist that in some instances, ICS amounts to the sale of children under this definition. Indeed, some scholars argue that the only valid approach to ICS under public international human rights law is to ban the practice, given its incompatibility with human rights law standards and

34 2001, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, A/RES/54/263.

norms.[35] While acknowledging these arguments and the arguable *jus cogens* status of the sale of children,[36] to date however, no international consensus has been reached as to whether ICS amounts to the sale of children.[37] Indeed, given the complex moral and philosophical aspects to this issue, it is likely to be a long time until states reach a broad consensus on this matter, and it is one of the reasons why reaching international agreement on how to regulate ICS is so fraught. Moreover, given the various fact scenarios and constructions of ICS in any individual ICS arrangement, it cannot be said with certainty that all instances of ICS amount to the sale of children.

As already noted, the question of whether and in what circumstances ICS does amount to the sale of children is largely outside the scope of this doctoral study. The decision to delimit the scope of the present study in this way has been taken for a number of reasons, namely:

- out of recognition that children are being born through ICS and following birth, are, in some instances, experiencing challenges to their exercise and enjoyment of their rights;
- to maintain a central focus on the rights of children born through ICS, given that these children are entitled to exercise and enjoy their rights regardless of whether or not they have been sold through ICS;
- to explore how the rights of children born through ICS can be better protected, even if they were sold through ICS;
- the question of whether or not ICS amounts to the sale of children (and in what instances ICS can be said to be tantamount to the sale of children)

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35 E.g. see J. Tobin, 'To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?', (2014) 63(2) *International and Comparative Law Quarterly,* 317; A. Gallagher, 'International surrogacy is dangerous and unfair', *Sydney Morning Herald,* 5 August 2014; and D. Smolin, "Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children", (2015-2016) 43 *Pepperdine Law Review,* 265.

36 *Jus cogens* are defined as "a peremptory norm of general international law", meaning "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted": Article 53, 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331. Bassiouni cites the international crimes of aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture as having the status of *jus cogens*: M.C. Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', (1996) 59(4) *Law and Contemporary Problems,* at 68. Arguably, Articles 35 and 3 CRC and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography indicate that the sale of children has reached *jus cogens* status. For further discussion in the context of international surrogacy, see Y. Ergas, 'Thinking 'Through' Human Rights: The Need for a Human Rights Perspective With Respect to the Regulation of Cross-border Reproductive Surrogacy,' Chapter 27 in Trimmings and Beaumont (eds.), *International Surrogacy Arrangements* (2013), 432-435.

37 For a discussion refuting the characterisation of compensated surrogacy as sale of children, see P. Gerber and K. O'Byrne, "Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy", in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015), at 95-99.

merits separate legal research, solely focused on that question (for example, it could be the subject of a separate doctoral study); and
- to fully answer the question of whether ICS amounts to the sale of children and in what instances, ideally field research and investigation is needed, in order to satisfactorily explore the nuances of the different ways in which the sale of children might occur in ICS. Such research and investigation may be suited to being undertaken through the expert mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography, for example through country visits.

The fact remains that children continue being born through ICS. As long as this continues to be the case, children's rights will be placed at risk. Therefore, rather than exploring whether ICS amounts to sale of children, this study is concerned with the practice of ICS as it is currently occurring, and its implications for the rights of children conceived and born through ICS. This study takes a pragmatic approach to the practical reality of ICS, placing focus on ICS as a contemporary method of family building that is creating children who are placed at a heightened vulnerability to rights violations. Given this reality, this study focuses on exploring what those children's rights violations are and how they can be guarded against.

This study therefore takes the view that as long as the practice of ICS continues, attention must be given to protecting the rights of children conceived and born this way. Of course, this does not exclude the possibility of work taking place concurrently to attempt to reach international consensus as to the broader approach to be taken regarding ICS, in order to protect those who it makes vulnerable – not least children. Such work should necessarily consider the question of whether ICS amounts to the sale of children. Indeed, such discussions are already underway and continue under the leadership of the Permanent Bureau of the Hague Conference on Private International Law[38] and the International Social Service,[39] and there is scope for the UN Special Rapporteur on the sale of children, child prostitution and child pornography to continue deepening her leadership role on exploring the particular issue of sale of children in the ICS context.[40]

Significantly too, despite having some commonalities with intercountry adoption (such as both being cross-border in nature and both being an alternative method of family formation), ICS is distinct from and different to intercountry adoption, and this study treats it as such. The most crucial differ-

38 See https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (accessed 13 July 2016).

39 See http://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy (accessed (13 July 2016).

40 Indeed, N.B. the Special Rapporteur's *Study on surrogacy and sale of children*, A/HRC/37/60, p.3ff.

ences to acknowledge are firstly that intercountry adoption is a measure primarily aimed at providing a family environment for an existing child who is in need of care and protection,[41] while ICS is not a care and protection measure. Whereas adoption concerns existing children, ICS is a way of creating new children, responding to the desires of commissioning parents to become parents or add children to their families. Secondly, whereas intercountry adoption is premised on safeguarding against the illegal movement of children across borders and is in no way intended to be commercial in nature,[42] ICS arrangements always involve a financial transaction of some nature occurring before commissioning parents receive a child. However, it is also important to note that both intercountry and domestic adoption orders have been used (and in some instances are continuing to be used) as a method of regularising and creating legal relationships between commissioning parents and children born through ICS.

Finally from a methodological and scope perspective, it is important to note that this doctoral study takes as its point of departure that:

- ICS is a method of family formation that is occurring despite questions regarding its legality/illegality and whether or not the practice is in the public interest;
- children are continuing to be born through ICS; and
- in some instances, children's rights are being infringed as a result of their birth through ICS.

Therefore, the scope of this study is confined to focusing on this contemporary reality, in order to:

- analyse how children's rights in ICS can be protected, promoted and upheld by implementing in practice the relevant standards and norms established under international human rights law (especially those established by the CRC); and
- explore how children's rights can be appropriately balanced with the rights and interests of the other core parties in ICS when they directly compete.

This means that the question of whether or not ICS is a method of family formation which is generally in the public interest is a question falling largely out of scope of the present study.

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41 The preamble to the 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption includes the following statements: "Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding", and "Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin".

42 See Articles 1(b), 4(c)(3) and 4(d)(4) 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption.

Limiting the scope of this doctoral study in this way is not to say that public interests arguments which exist for and against the practice of ICS are not important. On the contrary, the author acknowledges that in reaching future policy and legal positions and agreements on ICS at both the domestic and international levels, public interest considerations will be important for legislators and policy-makers to contend with. Indeed, the choice of whether to outlaw or permit ICS at the domestic and international levels will, to an extent, turn on the positions states choose to adopt regarding the challenges pertaining to public morals and ethics in ICS, and what is seen to be in the general interests of the public.

However, the practical reality remains that ICS as a method of family formation has developed despite the existence of public interests questions, and that even where ICS markets have been shut down (for example in states such as India and Thailand), new ICS markets have developed in other states (such as Cambodia[43]) to service the ongoing demand for ICS. In light of this practical reality, it is necessary and timely to explore the role that existing international human rights law standards and norms can play to protect the rights of those whose rights are made vulnerable in ICS (especially the rights of children born through ICS), and to guide the balancing of competing interests in ICS. This is what this study addresses.

5 The place and contribution of this study in the existing legal body of knowledge concerning International Commercial Surrogacy

This thesis is made up of a collection of articles, which have been written over a course of time through which ICS has been emerging and rapidly developing as a phenomenon. Over this time, a small body of legal scholars and institutions have been engaging with ICS from differing legal perspectives (and this body has increased over time). Work led by Beaumont and Trimmings commencing in 2010[44] was a forerunner to legal research which has taken place since focusing on ICS. The aim of Beaumont and Trimmings' project was "to examine private international law problems that arise in cases of cross-border surrogacy arrangements and to propose a global model of regulation of such arrangements."[45] As part of this project, a workshop was convened at the University of Aberdeen (which the author of this doctoral thesis participated in) bringing together legal specialists from 22 jurisdictions to discuss the

43 See V. Muong and W. Jackson, 'The Billion Dollar Babies', *The Phnom Penh Post*, 02 January 2016, http://www.phnompenhpost.com/post-weekend/billion-dollar-babies (accessed 13 July 2016).

44 See http://www.nuffieldfoundation.org/regulation-international-surrogacy-arrangements (accessed 13 July 2016).

45 As stated in the Series Editor's Preface to K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements* (2013).

current (at the time) snapshot of the domestic and private law approaches to surrogacy in their jurisdictions. Beaumont and Trimming's project culminated in the publication of an edited book,[46] drawing together their findings, including from the Aberdeen workshop.[47]

The Hague Conference on Private International Law has been the international legal institution directly engaging with ICS matters consistently since 2010, since the Council on General Affairs and Policy of the Hague Conference acknowledged "the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements".[48] Following this, the Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (17-25 June 2010) noted that "the number of international surrogacy arrangements is increasing rapidly. [It expressed] concern over the uncertainty surrounding the status of many of the children who are born as a result of these arrangements. [It viewed] as inappropriate the use of the Convention in cases of international surrogacy."[49] Since, the Hague Conference has published a number of preliminary documents, notes and reports on international surrogacy arrangements as part of its "Parentage/Surrogacy Project",[50] which studies "the private international law issues being encountered in relation to the legal parentage of children, as well as in relation to international surrogacy arrangements more specifically."[51] In 2015, the Council on General Affairs and Policy of the Hague Conference decided to convene an Expert's Group to explore the feasibility of advancing work concerning the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements.[52] The work of the Expert's Group on Parentage/Surrogacy is continuing and to date has largely focused on legal parentage matters.[53]

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46 K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements* (2013).

47 This includes a chapter focussing on surrogacy law and practice in New Zealand, written by the author of this doctoral thesis. See C. Achmad, 'New Zealand', Chapter 18 in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements* (2013), 295-310.

48 Council on General Affairs and Policy of the Hague Conference on Private International Law, *Conclusions and Recommendations adopted by the Council* (7-9 April 2010), at 3.

49 Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (17-25 June 2010), at [25].

50 A full listing is available at https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy

51 Ibid. A full chronology of the Parentage/Surrogacy Project is available at https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2011-2015 and https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2010-and-prior

52 Council on General Affairs and Policy of the Hague Conference on Private International Law, *Conclusions and Recommendations adopted by the Council* (24-26 March 2015), at [5].

53 Reports of the Expert's Group on Parentage/Surrogacy are available at https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2011-2015

Over the course of the present doctoral study, a number of other significant legal studies have also been undertaken which engage with ICS. These include a doctoral study by Koffeman examining reproductive matters and same-sex legal recognition in European jurisdictions,[54] and a doctoral study by Wells-Greco examining the status of children arising from inter-country surrogacy arrangements through a comparative legal perspective.[55] A collection edited by Gerber and O'Byrne brought together for the first time a series of articles on domestic and international surrogacy in its contemporary context from a human rights law perspective.[56]

At the wider international level too, two other developments are important to acknowledge. The first is to note that the United Nations Committee on the Rights of the Child has, over the course of this doctoral study being undertaken, made its first comments relating to surrogacy in Concluding Observations issued under the CRC reporting cycle.[57] Although its comments to date concerning surrogacy in its Concluding Observations remain limited and do not directly address ICS, given that surrogacy has remained a topic which the Committee has largely steered clear of engaging with previously, this signals a shift and indicates the Committee is viewing surrogacy as an issue of concern from a child rights perspective.

The second development worth noting at the international level is the work convened by International Social Service (ISS) concerning international surrogacy and the protection of children. In 2013, ISS issued an international call for action on international surrogacy,[58] followed by a second call for action in 2016.[59] Both calls for action focused on the need to protect the child's rights and best interests in all cases of international surrogacy. To support the advancement of this work, in 2015 ISS convened an International Experts Group to develop 'Principles for better protection of children's rights in cross-border reproductive arrangements, in particular international surrogacy'.[60] The drafting of these principles is on-going, and the author of this doctoral

54 N. Koffeman, *Morally sensitive issues and cross-border movement in the EU: The cases of reproductive matters and legal recognition of same-sex relationships* (2015).

55 M. Wells-Greco, *The Status of Children Arising from Inter-Country Surrogacy Arrangements* (2015).

56 P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015).

57 See Committee on the Rights of the Child, Concluding observations regarding Israel, 04 July 2013, CRC/C/ISR/CO/2-4, at [33] and Committee on the Rights of the Child, Concluding observations regarding India, 07 July 2014, CRC/C/IND/CO/3-4, at [57](d) and [58](d).

58 International Social Service, *International Surrogacy and Donor Conceived Persons – Preserving the Best Interest of Children: Call for action by the International Social Service Network,* July 2013, available at http://www.iss-ssi.org/images/Surrogacy/Call_for_Action2013_ANG.pdf (accessed 13 July 2016).

59 International Social Service, *Call for Action 2016: Urgent need for regulation of international surrogacy and artificial reproductive technologies,* January 2016, available at http://www.iss-ssi.org/images/Surrogacy/Call_for_Action2016.pdf (accessed 13 July 2016).

60 Ibid.

study is a member of the Core Expert Group responsible for drafting the principles. The work of the ISS International Expert's Group is complementary to, but distinct from the work of the Hague Expert's Group on Parentage/ Surrogacy, given that the ISS work takes a human rights perspective, first and foremost grounded in the standards and norms established by the CRC, and recognition of the need to protect and uphold the rights of children who are born through international surrogacy.

The study presented in this doctoral thesis adds to the existing legal body of knowledge on ICS by intentionally focusing in on the rights of children born through ICS, to explore how the CRC can be harnessed to protect their rights in practice. In doing so, this doctoral thesis is distinct from many of the other existing legal studies and initiatives concerning the phenomenon of ICS, because it makes practical recommendations for ways in which the CRC can be implemented in ICS to protect children's rights. It is the first comprehensive scientific legal research focusing on the child in ICS from a child rights perspective under international human rights law, placing attention on the rights of the child most at risk in ICS. As such, it raises new ways of thinking about the situation of children conceived and born through ICS, and offers practical and relevant insights and guidance for those making decisions affecting children in ICS situations, such as policy-makers, government decision makers at the executive level, and judicial decision-makers. The study presented in this doctoral thesis is also distinct as it proceeds from the recognition that despite the live nature of questions of whether or not the practice of ICS is in the public interest and the overall legality or illegality of ICS, children are continuing to be born through ICS, and as a result in some instances are facing infringements of their rights. Therefore, by proceeding from this reality, this thesis presents recommendations as to how infringements on and violations of the child rights shown to be most at risk in ICS situations may be avoided, by implementing the CRC in practice.

6 Structure of the study

This study has been undertaken as a thesis by articles, which are largely already published elsewhere. This is reflected in the structure of the thesis. The decision to choose to undertake this doctoral study as a thesis by articles is premised on the following reasons:

- The substantive topic of the study is, by nature, dynamic and emerging;
- Given the nature of the substantive topic of the study, a thesis by articles provides flexibility, enabling contributions to be made to contemporary debate and discourse, and for the work undertaken throughout the study to be published closer to the time of the developments in ICS occurring; and

- A desire on the part of the author to contribute to the growing body of scholarship on ICS as it emerges over time, in order to make a scientific contribution highlighting the child rights problems in ICS and to pose potential solutions, grounded in international human rights law standards and norms (in particular, the CRC).

Undertaking this doctoral study as a thesis by articles has meant that:
- Chapters of the thesis which have been published to date have been relevant to contemporary developments and have raised novel issues at the time of writing and publication;
- Aspects of the study have been cited in other scholarly works,[61] and as such have had an influence on the legal discourse concerning ICS as it has developed over time; and
- Bringing the various articles which comprise the doctoral study together in the body of work presented in this thesis highlights the journey the study has taken over time, from a point in time at which ICS was a topic which was largely 'under the radar', to a point in time where ICS is more widely recognised as a contemporary method of family formation, raising human rights and legal challenges.

All of the substantive chapters appearing in this thesis have a central thread running through them – namely a focus on children's rights in ICS and the role of international human rights law in protecting and upholding children's rights. All the chapters have either been published or submitted for publication as articles in academic journals or edited legal or multidisciplinary collections (except for Chapter Ten which has not been submitted for publication). The title of each chapter, its principal focus, as well as its publication status is summarised in the following schematic outline of the structure of the thesis.

61 *E.g.* J. Pascoe, 'State of the Nation – Federal Circuit Court of Australia', (FMCA) [2014] FedJSchol 21; J. McCrossin, 'Babies Without Borders', *Law Society of NSW Journal,* No. 9, Mar 2015: 40-43; S. Bassan, 'Shared Responsibility Regulation Model for Cross-Border Reproductive Transactions', 37 *Mich. J. Int'l L.* 299 (2015-2016); R. Scherman, G. Misca, K. Rotabi and P. Selman, 'Global commercial surrogacy and international adoption: parallels and differences', *Adoption and Fostering,* Vol 40 (2016) Issue 1, 20 – 35; Ilaria Anro, *Surrogacy from the Luxemourg and Strasbourg Perspectives: divergence, convergence and the chance for future dialogue,* Geneva Jean Monnet Working Paper 09/2016.

Ch.	*Title*	*Key focus*	*Publication status*
1	Introduction	Provides an overarching introduction to the doctoral thesis.	Published as part of the doctoral thesis.
2	Contextualising a 21st Century Challenge: Part One – Understanding International Commercial Surrogacy and the Parties whose Rights and Interests are at Stake in the Public International Law Context	Introduces ICS as a twenty-first century human rights challenge and examines the parties whose rights and interests are at stake in the public international law human rights context. These parties are focused on throughout the following chapters of the thesis.	Published in *New Zealand Family Law Journal*, Vol. 7, Part 7, August 2012, 190-198.
3	Contextualising a 21st Century Challenge: Part Two – Public International Law Human Rights Issues: Why Are the Rights and Interests of Women and Children at Stake in International Commercial Surrogacy	Introduces the rights and interests most at stake in ICS for the two most vulnerable parties from an international human rights law perspective: the women acting as surrogate mothers and the children conceived and born through ICS. Provides a foundational basis for closely examining children's rights in ICS in later chapters of the thesis.	Published in *New Zealand Family Law Journal*, Vol. 7, Part 8, December 2012, 206-216.
4	Multiple 'Mothers', Many Requirements for Protection: Children's Rights and the Status of Mothers in the Context of International Commercial Surrogacy	Analyses the complexities of the relationship between the child in ICS and their multiple 'mothers' (genetic, biological, legal, social). Presents discussion of the child's rights in relation to the rights and interests of these women, and examines how the rights and interests of the child can be balanced with those of their multiple 'mothers'.	Published in Y. Ergas, J. Jensen and S. Michel (eds), *Reassembling Motherhood: Procreation and Care in a Globalised World*, Columbia University Press, 2017.
5	International Commercial Surrogacy and Children's Rights: Babies, Borders, Responsibilities and Rights	Building on earlier chapters, argues that the child is the locus of vulnerability in ICS. Presents discussion of the ethics and economics of ICS in relation to children; assesses jurisprudential trends and non-judicial responses to ICS in selected demand-states, in relation to relevant international child rights legal norms and standards. Presents arguments regarding the need to harness and implement the CRC, so that children born through ICS can exercise and enjoy their rights.	Published in New Zealand Law Society, *International Adoption and Surrogacy – Family Formation in the 21st Century*, (2014).

Ch.	*Title*	*Key focus*	*Publication status*
6	Unconceived, Unborn, Uncertain: Is Pre-Birth Protection Necessary in International Commercial Surrogacy for Children to Exercise and Enjoy Their Rights Post-Birth?	Identifies and examines how preconception and prenatal decisions and actions in ICS can result in challenges to the child's rights once born. Makes recommendations for safeguards to be implemented before the child's conception, during the child's gestation and following the child's birth, to better protect and promote the child's rights in ICS in a holistic manner.	Accepted for publication in *The International Journal of Children's Rights,* Issue 1, 2018.
7	Securing children's right to a nationality in a changing world: the context of International Commercial Surrogacy	Focuses on the child's Art. 7 CRC right to a nationality as a child right most significantly at risk in ICS. Examines the ways in which children can end up stateless in ICS and recommends practical measures to implement the CRC and other relevant international human rights law standards, so that children born through ICS can secure their nationality right.	Published in in L. Van Waas and M. Khanna (eds) *Solving Statelessness* (2016) Wolf Legal Publishing, at 191-224.
8	Answering the "Who am I?" Question: Protecting the Right of Children Born Through International Commercial Surrogacy to Preserve Their Identity Under Article 8 of the United Nations Convention on the Rights of the Child	Focuses on the child's Art. 8 CRC right to identity preservation as a child right most significantly at risk in ICS. Argues that protecting this right is of central importance for children born through ICS, given the lifetime impact of not being able to exercise and enjoy their Art. 8 right. Makes recommendations for how Art. 8 can be upheld for children in ICS.	Submitted for publication in *Human Rights Law Review.*
9	Case Analysis: Children's Rights to the Fore in the European Court of Human Rights' First International Surrogacy Judgments	Presents a child rights, legal analysis of *Mennesson v. France* and *Labassee v. France,* landmark judgments in the European Court of Human Rights concerning ICS. Draws out linkages with the child rights discussed in Chapters 7 and 8 of the thesis, and the importance of the CRC in judicial decision-making in ICS previously discussed in Chapter 5 of the thesis.	Published in *European Human Rights Law Review* (2014), Issue 6, 638-646.

Ch.	*Title*	*Key focus*	*Publication status*
10	Multiple Potential Parents But a Child Always at the Centre: Balancing the Rights and Interests of the Parties to International Commercial Surrogacy Arrangements	Drawing on earlier chapters findings, presents a rights balancing analysis of the balancing of children's rights and interests with those of surrogates, genetic donor parents and commissioning parents in ICS. These are the practical rights balancing exercises necessary between the parties throughout ICS arrangements. Argues that in balancing competing rights and interests in ICS, once a child is born, his or her rights and best interests should be accorded priority.	Published as part of the doctoral thesis (not submitted for publication elsewhere).
11	Conclusion	Provides an overarching conclusion to the doctoral thesis, drawing on the main findings of previous chapters. Presents a framework of recommendations for protecting children's rights in ICS applicable to the contemporary context, proposed as the basis of a UN Committee on the Rights of the Child General Comment on children's rights in ICS.	Published as part of the doctoral thesis.

Some explanatory text as to the nature of ICS as a phenomenon and how it impacts on children's rights has been necessary to include in a number of the articles which are now presented as chapters in this thesis. This means that some repetition appears throughout the thesis, as a by-product of the fact that at the time which the individual articles which make up the chapters of the thesis were written (especially in the early part of the study), ICS was a topic which had received limited scholarly attention from an international human rights legal and child rights perspective.

At the time each chapter in this thesis was written, it was relevant to the real-time, contemporary developments in ICS. It is also noted that in some instances, the information concerning ICS which appears in some of the chapters of the thesis is now out-of-date, given the fast-paced development of ICS as a phenomenon. However, the combination of newer and older chapters presented in this thesis is illustrative of how the phenomenon of ICS has developed over time, and how this doctoral study has sought to engage with these developments as they have occurred, from a child rights perspective under international human rights law. The contextual commentary included as part of the overviews appearing before each chapter of the thesis highlight the relevance of the chapter's contents at the time it was written; key developments

in ICS since that time; and the continued relevance of the arguments and main findings presented in the chapter.

From a structural perspective, the doctoral thesis is tied together by the central focus on children's rights in ICS, and this introductory chapter to the thesis; the brief chapter overviews appearing at the start of each chapter; and the conclusion to the overall study (Chapter Eleven). The conclusion to the study (Chapter Eleven) further draws the strands of the study together by presenting a comprehensive framework of recommendations proposed to form the basis of a Committee on the Rights of the Child General Comment on the rights of the child in ICS. The Conclusion to this study underscores the relevance and application of this doctoral study to the contemporary children's rights context up to the present day.

7 Outline of the study

This thesis is presented through nine chapters, along with this Introduction to the study (Chapter One) and a Conclusion to the study (Chapter Eleven). Chapters Two[62] and Three[63] introduce ICS as a 21st century human rights and child rights challenge. These initial chapters provide an overview of the phenomenon of ICS through a public international law, human rights lens. These chapters are important to set the scene for understanding the complex, multifaceted nature of ICS, and serve to contextualise the discussion in later chapters which hones in more closely on the particular situation of the child and their rights in ICS, including their rights most at risk.

Chapter Two discusses the emergence and development of the ICS market and predominantly focuses on introducing the parties whose rights and interests are at stake in ICS, the 'core parties' to ICS arrangements, namely the child, the surrogate and the commissioning parents. The core bioethical and moral challenges raised by ICS are briefly touched upon and provide important background context to the legal, child rights focus of this thesis. This Chapter also foreshadows some of the issues triggered in ICS by the existence of competing rights and interests of the core parties to ICS arrangements.

Chapter Three then extends the discussion begun in Chapter Two, by focussing in on the main human rights law challenges arising through ICS under public international law. The main question explored is 'why and how are the rights and interests of women and children at stake in ICS?'. Primary emphasis is placed on the rights of the child at stake, with a secondary focus on the rights of surrogate women in ICS. When this Chapter was written (2012), no academic scholarship existed which comprehensively examined how ICS

62 Originally published in *New Zealand Family Law Journal*, Vol. 7, Part 7, August 2012, 190-198.
63 Originally published in *New Zealand Family Law Journal*, Vol. 7, Part 8, December 2012, 206-216.

impacts on the child's rights. Therefore, this Chapter filled an existing gap in scholarship at the time, and argues that ICS should be recognised as an international human rights challenge to the rights of the child. Central challenges to the child's rights in ICS are identified and discussed, in the context of and with reference to the relevant provisions of the CRC. This begins building a picture of the potential negative impacts of conception and birth through ICS on the rights of children. This Chapter then acknowledges that at the time of writing, much of the existing scholarship regarding ICS focused on the situation of women acting as surrogates (often from the perspectives of anthropology, documentary-making and sociology). In order to draw on this pre-existing body of literature and to place it within the context of the current study, Chapter Three provides an overview of some of the key human rights issues pertaining to women in the ICS context, and discusses some of the human rights challenges common to both surrogate women and children in ICS, namely the risks of commodification and human trafficking. In doing so, this highlights the broader human rights picture at play, again emphasising the intersecting nature of many of the rights and interests at stake in ICS.

Chapter Four[64] builds on the close links between children and women in ICS, through an examination of child rights in relation to the status of the multiple potential 'mothers' in ICS. This Chapter brings a unique focus from a rights perspective to one of the central relationships in all ICS arrangements, between the child and their potential multiple 'mothers'. It discusses the construct of 'mother' as inherently related to 'child', and analyses the different 'mothers' involved in ICS: surrogate (the only person with a foetal-maternal link through the biological act of carrying to term and giving birth to the child); genetic (the only woman with a DNA link with the resulting child); and commissioning (where a woman is involved, the woman or women who want(s) to parent the child). This discussion illustrates that establishing the status of the various potential mothers in ICS is both socially and legally complex. In doing so, this Chapter draws attention to the contestable nature of the notion of 'mother' in ICS and traverses the corresponding implications for the rights of children.

Chapter Five[65] deepens the focus on the child's rights in ICS and develops the idea of the child as the locus of vulnerability in ICS arrangements. As part of this analysis, this Chapter presents an extended discussion of the ethics and economics of the commercialisation of the conception of children. Specific CRC rights which are at the most significant risk in ICS are highlighted: to nationality and to preserve identity, to grow up in a family environment, and to

64 Originally published in in Y. Ergas, J. Jensen and S. Michel (eds), *Reassembling Motherhood: Procreation and Care in a Globalised World,* Columbia University Press, 2017.

65 Originally published in New Zealand Law Society, *International Adoption and Surrogacy – Family Formation in the 21st Century*, (2014).

education, health and social security. This Chapter also highlights jurisprudential trends (through case law analysis) and non-judicial responses (especially national guidelines/government guidance as quasi-policy approaches to ICS) in three ICS 'demand' states (Australia, New Zealand and the United Kingdom). These are examined in relation to the child rights framework, in order to assess the extent to which child rights are being promoted, protected and upheld through these responses to ICS. This Chapter illustrates that the clash of rights involved in ICS between the child and the other core parties is difficult to avoid, but that increased efforts and measures to place the child's rights and best interests at the heart of the practice of ICS is both necessary and possible.

Chapter Six[66] deals with an issue that must be contended with in order to present a holistic consideration of the child's rights in ICS. This is the question of whether any protection of the future child's rights is necessary prior to the child being conceived and before the child's birth, in order to ensure the child is able to exercise and enjoy their CRC rights once born. This Chapter explores the hypothesis that due to the intentional, planned nature of ICS and the involvement of multiple parties, protection of particularly at-risk child rights is required preconception and pre-birth in the specific context of ICS. It does so by analysing the legal context of the future child's rights both preconception and pre-birth; identifying the child's rights which are placed at risk through actions and decisions occurring pre-conception and pre-birth in ICS; and analysing the potential impacts of these actions and decisions on the child's rights once born. This Chapter is, therefore, an important backdrop to the chapters of the thesis that follow after it, which focus on the child's specific rights most at risk in ICS. As part of the discussion presented in Chapter Six, the CRC is closely examined to establish whether it provides a basis for preconception and prenatal protection of the child's rights, and relevant domestic and regional jurisprudential approaches to the unborn child are analysed to extract lessons for ICS. In dealing with this subject, this Chapter also contributes to the wider body of child rights legal scholarship concerning pre-natal rights and the situation of the unborn child. Practical measures are suggested, aimed at protecting the future child's rights pre-conception and pre-birth in ICS in order to preserve the child's opportunity to exercise and enjoy their rights in the event that they are born.

Chapters Seven[67] and Eight[68] hone in on two of the child rights most significantly at risk in ICS and in doing so provide in-depth analysis of how these rights are at risk and how they can be better protected. Chapter Seven is a close analysis of the challenge of securing the child's right to a nationality

66 Accepted for publication in *The International Journal of Children's Rights,* Issue 1, 2018.

67 Originally published in in L. Van Waas and M. Khanna (eds) *Solving Statelessness* (2016) Wolf Legal Publishing, at 191-224.

68 Submitted for publication in *Human Rights Law Review.*

under Article 7 CRC in ICS. Children born through ICS are sometimes born stateless and stranded in their birth state. This Chapter provides an overview of the child's Article 7 right and discusses why and how child statelessness arises in ICS, and highlights the wider child rights implications of statelessness in ICS. Here, the intersecting nature of the child's right to a nationality with other CRC rights is made clear. As well as drawing attention to state responses to the issue of child statelessness in ICS, jurisprudence dealing with child nationality and ICS is discussed. This Chapter proposes practical solutions to the problem of child statelessness in ICS, to prevent further children from being precluded from enjoying their right to a nationality.

Intersecting with the discussion in Chapter Seven, Chapter Eight closely analyses the child's right to preserve their identity under Article 8 CRC in the ICS context. As well as providing an overview of the child's Article 8 right and related key regional human rights jurisprudence, this Chapter examines the three elements of identity most at risk in ICS: genetic and biological (including the health rights implications for the child); personal narrative; and cultural. It makes clear that the child's Article 8 CRC right is precarious in ICS and argues that the child's Article 8 right is the central child rights challenge in ICS. It makes the case that in instances where this right is not protected and upheld, it will have a lifetime impact on the child. This is illustrated with reference to case examples in which children conceived and born through ICS have had their Article 8 right endangered, and in some cases, violated. Along with the public international law human rights framework, key lessons from donor-conception, adoption and domestic surrogacy are drawn on to propose practical measures of implementation of Article 8 CRC in the ICS context, to make this right real for children conceived and born through ICS. This Chapter makes clear that safeguarding the right to identity preservation must be treated as a matter of central importance for all children conceived and born through ICS.

Chapter Nine[69] presents a case analysis of the landmark European Court of Human Rights cases of *Mennesson v. France*[70] and *Labassee v. France*.[71] These cases are significant in the context of this study given they were the first judgments concerning ICS issued by a regional human rights court; furthermore, they warrant analysis as they indicate an approach to ICS emphasising the rights of the children involved. Despite dating from 2014 and the fact that the European Court of Human Rights has dealt with other applications concerning ICS since,[72] the Court's reasoning in *Mennesson* and *Labassee* continues

69 Originally published in *European Human Rights Law Review* (2014), Issue 6, 638-646.

70 *Mennesson v. France*, Application No 65192/11, Merits and Just Satisfaction, 26 June 2014.

71 *Labassee v. France*, Application No 65941/11, Merits and Just Satisfaction, 26 June 2014.

72 The most significant being the judgment of the Grand Chamber in *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment, 24 January 2017, overturning the earlier judgment of the Court (Second Section), Merits and Just Satisfaction, 27 January 2015.

to provide insight and context from a child rights perspective. This Chapter analyses the rights situation of the children concerned in the two cases, outlines the main arguments in the European Court of Human Rights and analyses the judgments. This Chapter serves to further place the preceding two Chapters concerning the child's rights to nationality and preservation of identity in context, given that the *Mennesson* and *Labassee* judgments emphasise the importance of protecting these child rights in ICS arrangements, and impacts experienced by children when this does not occur. This Chapter also comments on the broader future implications of the *Mennesson* and *Labassee* judgments for the rights of children in ICS. An Addendum to Chapter Nine is included, providing a brief analysis from a child rights perspective of the first ICS judgment of the Grand Chamber of the European Court of Human Rights, given the landmark nature of the judgment.

With the previous chapters having covered the rights of the child most significantly at risk in ICS and presenting concrete recommendations for the promotion and protection of these rights, Chapter Ten deals with balancing the rights of the child with the rights and interests of the other core parties to ICS (surrogates, genetic donor parents and commissioning parents). This is important because ICS arrangements often raise a clash of competing rights and interests.[73] However, this Chapter argues that the child's rights and best interests must always be central to any rights balancing exercise in ICS. The child's rights must be protected and prioritised wherever possible, consistent with their best interests, unless this would result in a violation of the rights of another party to the ICS arrangement which outweighs the protection of the child's rights. Furthermore, in some instances where the rights of an adult party would be negated by protecting the child's rights in ICS, it is argued that on balance, this may be necessary.

Chapter Eleven presents the conclusion to this study. It unites the overall picture of child rights in ICS provided by the preceding chapters and comments on the steps to be taken to better protect the rights of children conceived and born through ICS. As well as commenting on the future of ICS and associated developments in family formation, the Conclusion comprehensively outlines the recommendations made throughout this thesis by presenting a framework for a Committee on the Rights of the Child General Comment on the rights of children in International Commercial Surrogacy. This framework is grounded in the standards and norms established by the public international human rights law framework, in particular the CRC, and tailored towards protecting the child's most at-risk rights in ICS. The proposed framework is

73 As Gerber and O'Byrne observe, "Viewed from a human rights perspective, the interests of the child born via surrogacy may compete with the interests of other participants in the surrogacy arrangement." P. Gerber and K. O'Byrne, "Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy", in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015), at 82.

intended as practical guidance for a broad range of actors in ICS, able to be implemented regardless of the persistent lack of international agreement on the practice of ICS generally, and regardless of the lack of cohesive and comprehensive legislative and policy measures governing ICS at the domestic level in some states.

Therefore, the framework proposed in the Conclusion to this study is aimed at responding to the need in practice (demonstrated throughout the main chapters of this study) to ensure that the rights of children who are being born through ICS are prioritised and actively protected and safeguarded in ICS. As such, the Conclusion makes clear that the findings and recommendations of this study are of immediate relevance and practical application for the range of actors contending with the child and human rights challenges arising from ICS, including states and their governments around the world. If the Committee on the Rights of the Child issues guidance based on this framework and it is implemented by a range of actors involved in ICS, it will mean that children conceived and born through ICS are not prevented from exercising and enjoying the rights to which they are entitled, despite their heightened vulnerability in ICS.

2 Contextualising a 21st Century Challenge: Part One

Understanding International Commercial Surrogacy and the Parties whose Rights and Interests are at Stake in the Public International Law Context

Abstract

International commercial surrogacy (ICS) has developed over the past decade as an alternative method of family formation at the intersection of science and technology, globalisation and changing social patterns, raising profound human rights, legal and ethical questions. This Chapter introduces ICS as a twenty-first century human rights challenge and provides a comprehensive examination of the parties whose rights and interests are at stake in the public international law context. In doing so, it provides a solid contextual foundation to frame the analysis and arguments presented in the later chapters of this study concerning the person at the centre of all ICS arrangements: the child.

Main Findings

- ICS arrangements are often factually complex, owing to the involvement of multiple parties and the fact that the ICS market has grown in an unregulated manner.
- ICS is controversial due to the legal, human rights, moral and bioethical questions it raises.
- From a public international law, human rights perspective, the rights of surrogate women and children are those most at risk in ICS.
- A child is at the centre of all ICS arrangements; children born through ICS – like all other children – are entitled to all the rights provided by the CRC.
- The child's rights and interests may clash with those of other parties to ICS arrangements, necessitating rights balancing exercises.

Contextual notes

- This Chapter was written when ICS was still very much an emerging phenomenon, and not yet widely recognised as raising international human rights challenges.

- At the time it was written, this Chapter was one of a small number of scholarly works engaging with the phenomenon of ICS from a public international law, human rights perspective.
- Since the time this Chapter was written, the human rights challenges raised by ICS are much better understood; today a growing body of scholarly works exists concerning the human rights challenges raised by ICS, from a legal perspective.
- As a reaction to the legal and human rights problems raised by ICS, some States have since taken steps to outlaw ICS while others have addressed ICS through policy guidance; however, ICS remains unregulated at the international level.

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1 Introduction

It is well-documented that children and women remain two of the most vulnerable groups of human beings in our societies today. However, relatively little legal discussion occurs in relation to a specific group of vulnerable children and women whose human rights are at stake due to the rapidly emerging practice of international commercial surrogacy (ICS). The current unregulated growth of this practice is quietly causing a concurrent growth in potential human rights violations of the children and women whom it involves, and on whose lives it has an enduring impact and effect. This development is unsettling in a number of areas – not least due to the ethical issues it raises. One important question which has received relatively little attention or analysis to date however, is the question of what role could, or should the law play in this rapidly growing trans-boundary issue born of our 21st century globalised world? Already, national judiciaries are being confronted with complex ICS cases, with judges struggling to grapple with the legal, ethical and moral minefield that ICS cases present.

This article is presented in two parts, and explores the phenomenon of ICS from a predominantly public international law perspective, placing a focus on the human rights and legal challenges raised. In this, the first part of the article, attention rests on identifying and discussing the parties to ICS arrangements in the public international context. The second (forthcoming) article focusses on the public international law human rights issues and challenges raised by ICS. Particular regard is given to those whom this phenomenon has the potential to leave most vulnerable: the children born and the women who act as surrogate mothers. Those who commission ICS arrangements often give minimal thought to the human rights of the children and women involved, and the fact that these require protection. There has also been little considera-

tion given to the role that the law could or should potentially play in ICS, or indeed the potential value of the law in such situations, and for whose benefit. The lack of legal regulation, in many cases at the domestic level, and the absence of any overarching international framework to regulate ICS, is a point of weakness and a factor potentially leading to serious human rights violations.

Issues of immigration, parentage, guardianship, adoption and citizenship are often the issues raised by ICS given most attention. However, a more holistic assessment seems appropriate, in particular one which incorporates consideration of the human rights issues at stake, in parallel – and with a respect for – analysis of the relevant private law issues, as well as being infused with a multidisciplinary outlook. Additional to legal concerns, public policy issues are writ large in any discussion of ICS. On this note, the Hague Conference accurately observes that this is

> 'an area in which there will be differences of opinion about the proper balances to be struck, for example, between regulating the conduct of adults and ensuring protection for the rights or welfare of the born child, or between party autonomy and the pursuit of other public policy objectives such as the suppression of commercialism in human reproduction.'[1]

Given the recent advent of ICS, it is perhaps not that surprising that no coordinated international law approach or attempt to regulate and protect (either in the public or private international law spheres) has been taken or even considered extensively with regard to the challenges it poses. However, time and the obstacles faced should not be allowed to hinder any further the protection of the rights of the children and women involved. Therefore the exploration of ICS from an overarching international law perspective should not be further delayed. As Lee notes, international problems require international solutions:

> 'Governments should recognize their duty to protect children, women and families from opportunistic and reckless practitioners who primarily seek to profit from the existing climate of disparate regulation of commercial surrogacy. Many public policy issues can no longer be resolved within the isolation of national borders. […] success requires either global coordination or cooperation. Inaction could harm the health and safety of women and children.'[2]

1 Permanent Bureau of the Hague Conference on Private International Law, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising From International Surrogacy Arrangements* (Prel. Doc. No. 11, March 2011).

2 Ruby Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 Hastings Women's Law Journal 299 (2009).

Lee further posits that "In an integrated global society, inaction can have direct consequences to all."[3]

2 Understanding International Commercial Surrogacy and its parties

Whilst the practice of surrogacy is not new[4] and the use of surrogates underwent a modern resurgence in the 1980s (predominantly in the United States),[5] international commercial surrogacy (ICS) is very much a phenomenon of recent times. In fact, it is best understood as a 21st century challenge given that it has rapidly emerged in the past ten years and raises, among others, intersecting issues of bioethics, reproductive technologies and science, changing familial structures, the use of the human body, modern communication media, globalisation and law.

Under an ICS arrangement (as distinct from compassionate or altruistic surrogacy which is non-commercial in nature), "commissioning parents" (heterosexual or homosexual couples or individuals) are motivated by different reasons (discussed further below) to arrange for a surrogate mother located in a different country than that in which they live, to carry a child to term. After birth, the surrogate is expected to hand the child over to the commissioning parents, who will raise the child, in many instances without on-going contact with the surrogate. Depending on the particular arrangement, the surrogate may in fact act anonymously throughout the entire process from impregnation to provision of the child to the commissioning parents. In terms of the biological make-up of the child born from an ICS arrangement, there are many possibilities (for ease of reference the six core possibilities, which may have variants dependent on whether donors or surrogates act anonymously or are known, are also set out in diagrammatic form at Figure 1). The child may or may not be genetically linked to one or both of the commissioning parents. The child may or may not be genetically linked to the surrogate mother. Where there is a genetic link to the surrogate, this may be understood as a "traditional surrogacy"[6] or "complete surrogacy"[7] given that the surro-

3 *Id.* at 299.

4 Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues – Expanded Edition*, 5 (1990).

5 *E.g. id.* At 2-4, Field discusses two of the most well-known cases from this period in the US, *Stiver v Parker*, 975 F.2d 261 (6th cir. 1992), and *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

6 Margaret Ryznar uses the term "traditional surrogacy" meaning one which "results in a surrogate's genetic child following her artificial insemination with the intended father's sperm." *See* Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43(4) John Marshall Law Review 1010 (2010). The "traditional" aspect can therefore be understood as drawn from the fact that the surrogate gives birth to her "own" child in the sense that it is genetically related to her, and not genetically related to the commissioning mother or to a third-party egg donor.

gate both provides her own genetic material to create the child, and therefore has a genetic link to the child as well as being its carrier during gestation. Where there is no genetic link to the surrogate, the term 'gestational surrogate' is often used.[8] Eggs and sperm are sometimes separately paid for and implanted (provided by donors), or an embryo is purchased and implanted. Any of these variants may either involve known or anonymous donors. In some ICS cases, the advent of cryo-shipping is utilised, to ship embryos or sperm or eggs via international courier from their origin to the place in the world where they will be used in an ICS arrangement. An exchange of money adds the 'commercial' element to ICS; fees are often paid to surrogacy clinics carrying out the associated medical procedures, and/or to the third party who arranges the surrogacy, and/or to the surrogate herself. Contractual documents sometimes govern the transactions, but not always.[9] Of course, the exact nature of each commercial surrogacy arrangement differs in all these aspects, and it is in many cases difficult to map all the various persons, places and transactions involved; this sets ICS apart from domestic surrogacy arrangements, or purely altruistic compassionate surrogacy, squarely locating it in the context of the 21st century globalised world.

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7 Mary Lyndon Shanley prefers this term to the use of "traditional surrogacy". *See* Mary Lyndon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption and Same-Sex and Unwed Parents*, 103 (2001).

8 *E.g.* this is the term used by Amrita Pande throughout her work focussing on non-genetic surrogate mothers in India. *See* Amrita Pande, *It May Be Her Eggs But It's My Blood: Surrogates and Everyday Forms of Kinship in India*, 32 Qualitative Sociology 379-397 (2009). Sangeeta Udgaonkar states that "Gestational surrogacy arises when the embryo is transferred into the uterus of the surrogate mother and is then carried by her. The surrogate mother only contributes her womb but not her occyte. […] Genetic surrogacy arises when the surrogate donates the oocyte as well as carries the child. In a genetic surrogacy, therefore, the surrogate mother is an oocyte donor as well." *See* Sangeeta Udgaonkar, *The Regulation of Oocyte Donation and Surrogate Motherhood in India*, in *Making Babies: Birth Markets and Assisted Reproductive Technologies in India* 82 (Sandhya Srinivasan ed., 2010). Ryznar surmises that in the process of gestational surrogacy, "the surrogate mother bears a non-genetic child following in-vitro fertilisation with a couple's embryo". *See* Ryznar, *supra* note 6, 1010. However, what Ryznar fails to note is that the "couple's embryo" may not always constitute the genetic material of the commissioning parents themselves; while it is true that in many cases the sperm of the commissioning father is used, the egg used in the embryo may have come from the commissioning mother, or it may have come from a third party (possibly anonymous) egg donor.

9 *See* for a comprehensive discussion of the various types of surrogacy arrangements the Indian Supreme Court's observations in Baby Manji Yamada Vs. Union of India & ANR [2008] INSC 1656 (29 September 2008), paras. [5]-[12].

Figure 1: the main models of international commercial surrogacy

Given the above, an ICS arrangement could lead to a scenario, for example, whereby a heterosexual couple in New Zealand pays a clinic in Thailand for the implantation of the male's sperm, combined with an ovum purchased from the United States, into a Thai surrogate mother who gives birth in Thailand. Alternatively, consider the scenario described in a recent article: "In a hospital room on the Greek island of Crete with views of a sapphire sea lapping at ancient fortress walls, a Bulgarian woman plans to deliver a baby whose biological mother is an anonymous European egg donor, whose father is Italian, and whose birth is being orchestrated from Los Angeles. She won't be keeping the child."[10] Superficially, the complexities of such factual scenarios are immediately apparent, but a further tangle of difficult issues underlies these scenarios, raising numerous potential human rights challenges for the children born and the surrogate mothers involved. These issues will be dealt

10 Tamara Audi and Arlene Chang, Assembling the Global Baby, 10 December 2010, Wall Street Journal Online, available at http://online.wsj.com/article/SB10001424052748703493504576007774155273928.html (last visited June 1, 2011).

with in the second article in this series, however, should ideally be considered within the context presented in this (the first) article.

3 Tracking the emergence and development of a market: a global 'trade' in babies through international commercial surrogacy

The emergence of ICS really started to become prominent in the early 2000s,[11] but it has only been in the last 5 years where there has been a clearly identifiable increasing trend of greater use of these arrangements.[12] As the Hague Conference on Private International Law recently stated in a discussion paper on international surrogacy, "A brief internet search of "international surrogacy" and, in today's world, one is a click away from hundreds of websites promising to solve the problems of infertility through in-vitro fertilisation techniques ("IVF") and surrogacy: for a price. It is now a simple fact that surrogacy is a booming, global business."[13] Domestically, surrogacy is the subject of legal regulation in many jurisdictions. Some states – in fact the majority of states which regulate surrogacy – take a very strict approach to commercial surrogacy, banning it outright, whilst altruistic surrogacy is generally permitted in those jurisdictions.[14] Commercial surrogacy is however, legal in some other jurisdictions and in those places there is a dedicated domestic legal regime which governs the practice of surrogacy.[15] Celebrity cases in the media (for

11 *See* for one of the first legal assessments of ICS, Angie Goodwin McEwen, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 Vanderbilt Journal of Transnational Law 271-304 (1999).

12 This is evident in the increased numbers of cases coming before domestic courts in jurisdictions such as the United Kingdom, India and France on the issue, whereas previously they were virtually non-existent. *E.g. see* the recent cases of *RE: L (A minor)*, [2010] EWHC 3146 (Fam) (UK); *Balaz v Anand Municipality*, High Court of Ahmedabad (11 November 2009) (India); and the Mennesson case involving French commissioning parents who had twins in California via ICS, Arrêt n° 370 du 6 Avril 2011 (10-19.053), Cour de Cassation – Première Chambre Civile (France).

13 Permanent Bureau of the Hague Conference on Private International Law, *supra* note 1, 6.

14 *E.g.* New Zealand, Canada, Australia, The Netherlands, Belgium, the United Kingdom. In France and Italy however, all forms of surrogacy are illegal. For a helpful survey on domestic legislative responses to surrogacy see Susan Markens, *Surrogate Motherhood and the Politics of Reproduction* 20-49 (2007).

15 *E.g.* in Israel and Ukraine. In India, the controversial Draft Assisted Reproductive Technologies (Regulation) Bill 2010, available at http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf (last visited June 1, 2011), has been finalised and is awaiting approval. It will bring into effect a comprehensive domestic regime governing clinics providing international surrogacy in India and addresses related rights and duties. *See* for commentary on the Bill, A. Malhotra, *Legalising Surrogacy – Boon or Bane?*, 2010, The Tribune India, available at http://www.tribuneindia.com/2010/20100714/edit.htm#6 (last visited June 1 2011); Jagran News Network, *Bill on Surrogate Mother Awaits Approval of Law Ministry*, January 27, 2011, available at http://post.jagran.com/bill-on-surrogate-mother-awaits-approval-of-law-ministry-1296102040 (last visited June 1, 2011).

example Cristiano Ronaldo, Elton John) have drawn attention to ICS, but everyday people are driving demand for the service of ICS, fuelling recent growth in what some are now calling a baby production 'industry'.[16] Demand for ICS appears to be growing, and as the very possibility to undertake such arrangements is becoming more widely known (and is easily available via the internet), the supply end of the market is trying to keep pace and expand to meet this demand. In particular, growth is apparent in developing states such as Thailand and India, seeking to cater to the growing number of prospective commissioning parents from the developed world. ICS has the potential to be a very big, global business (arguably it already evinces the hallmarks of this), which in turn has the potential to generate substantial profits for the many different actors involved, such as medical clinics, surrogacy brokers, and surrogate mothers.[17] In discussing the role that contractual arrangements – which exist in and govern some ICS arrangements – take on in this market, McEwan notes that "The modern contracts between surrogate mothers and commissioning parents have become a market-driven event that is much more complicated than simply bringing a new life into the world."[18]

The development of this market is reliant on the on-going demand of commissioning parents as the party in ICS arrangements driven by a desire for a child, and thus for the surrogacy arrangement. The various motivations of such commissioning parents are discussed below, but it is interesting at this point to raise the question of whether the growth in the ICS market should be understood as having grown out of being a market of 'last resort' – that is, commissioning parents tend to only resort to such arrangements after exhausting all other alternative options, or, should it be better understood as being a market of 'easy resort' – that is, one which is convenient to commissioning parents as they can have a baby created for them offshore without the usual stresses and hassles of a regular pregnancy (granted though, an ICS arrangement comes with many other unique stresses and hassles of its own).[19] In practice, a combination of both elements is probably likely to be present.

One of the most problematic aspects of the ICS market as it currently operates, from a legal perspective, is the unregulated international nature of the market which characterises it. The "global baby economy", described by

16 *E.g.* Zippi Brand Frank, *Google Baby* (film, 2009).

17 In India, the ICS market as a whole is currently estimated to be worth US$445 million annually. *See* Neha Wadekar, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, 10:3 TuftScope: The Journal of Health, Ethics and Policy (2011) available at http://www.tuftscopejournal.org/issues/S11 (last visited June 1, 2011).

18 McEwen, *supra* note 11, at 273.

19 Rachel Cook, Shelley Day Sclater, and F. Kaganas (eds.), Surrogate Motherhood: International Perspectives, 3 (2003); P.S. Hoe, More Seek International Surrogate Mothers, November 8, 2010, The New York World, available at http://thenewyorkworld.com/2010/11/08/more-seek-international-surrogate-mothers/ (last visited June 1, 2011).

one commentator as the "baby production industry in age of globalisation"[20] has been allowed to establish itself and to grow with very few legal barriers, besides domestic laws which may or may not regulate the practice in part, dependent on the various jurisdictions in which the parties to the surrogacy arrangement are located. Lee frames the practice using the term "global outsourcing of commercial surrogacy".[21] Essentially, having enough money to pay for ICS is the only gatekeeper directly regulating the market at the international level, other than where individual states have enacted domestic legislation which addresses ICS.[22] However, to date such states are few, and therefore the effect is piecemeal and far from providing any sort of overarching legal regime, let alone a protective legal regime focussed on the children born and the women who act as surrogates. To have such a market functioning across borders – essentially trading in human life – without any coordinated legal regulation[23] or consideration of how to provide a protective framework, is highly problematic.

4 THE PARTIES TO INTERNATIONAL COMMERCIAL SURROGACY ARRANGEMENTS

Having discussed the emergence of the phenomenon of ICS, focus of this article now turns to highlight the various parties involved in an ICS arrangement. An understanding of the different, often very personal, motivations driving the various parties' actions or underlying their specific situations is essential at this point. This will help serve as a background against which to consider wider human rights legal issues associated with ICS.

4.1 The commissioning parents

The commissioning parents are those who commission the ICS arrangement, and thereby the engagement of a surrogate, possibly an arrangement through a medical clinic and/or surrogacy broker, and crucially, the creation of a child.

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20 Zippi Brand Frank, *Google Baby: Synopsis*, 2010, available at http://www.zippibrandfrank.com/ (last visited June 1, 2011.

21 Lee, *supra* note 2, at 275-300.

22 *E.g.* in Australia the New South Wales Surrogacy Act 2010 bans ICS; in India, the Draft Assisted Reproductive Technologies (Regulation) Bill 2010, when it comes into effect, will allow ICS within a regulatory framework.

23 Consideration of the prospects for a private international law regulatory framework currently forms part of a research project being undertaken at the University of Aberdeen, with support from the Hague Conference on Private International Law. The project is called "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level", and is led by Professor Paul Beaumont and Dr. Katarina Trimmings. Background to the research is available at http://www.abdn.ac.uk/law/surrogacy/index.shtml (last visited June 1, 2011).

Sometimes an individual will commission an ICS arrangement, but in the majority of instances it is a couple that commissions an international surrogate child, therefore the term "commissioning parents" will be used throughout this article; it is worth noting that sometimes the term "intending parents" is used.[24]

A range of factors may underlie the actions of commissioning parents. For example, in many ICS cases, the commissioning parents are themselves unable to conceive (for varying reasons) and may have already been through a number of rounds of in vitro fertilisation treatment (IVF, also sometimes known as artificial reproduction treatment or ART) without success; in some cases they have exhausted the surrogacy options in their home country, again without success (either due to there being a lack of women willing to act as surrogates, or due to legal barriers). Alternatively, some commissioning parents will have explored the adoption options which may be available either locally or via intercountry adoption. However, the declining number of children available for adoption worldwide,[25] coupled with the difficulties in adopting a child internationally (such as time delays, strict eligibility requirements, the nature of the children available) arguably make adoption an option trending downwards in its uptake around the world.[26]

Having often explored other options as discussed above, ICS then might become an attractive and viable option for commissioning parents who have the financial means to access it, for a number of reasons. Firstly, many commissioning parents have a strong preference for a child who has a genetic link to both or at least one of the commissioning parents; this may in fact be ICS' strongest selling point. As McEwan notes, "parents' desires for a genetic link with their children makes surrogacy attractive in its own right".[27] It may be possible for commissioning parents to achieve this via an ICS arrangement, either through means of embryo implantation (using the commissioning parents' genetic sperm and egg) in the surrogate, or by using the commissioning father's sperm. Going to extreme cases, the possibility of a so-called "saviour-sibling child" – a child who is conceived in order to enable access to genetic material such as bone marrow for a sick sibling – could be the motivation underlying some ICS arrangements.[28] Related to the desire for a

24 *E.g.* Ryznar, *supra* note 6; the Permanent Bureau of the Hague Conference on Private International Law, *supra* note 1.

25 *See generally* Robin Hilborn, *Global Adoptions Fall One-Third in Six Years*, *Adoption News Central,* March 15, 2011, available at http://www.familyhelper.net/news/110315global.html (last visited June 20, 2011); and Peter F. Selman, *Intercountry Adoption in Europe 1998-2008: Patterns, Trends and Issues*, 34:1 Adoption and Fostering 8, 15 (2010).

26 Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1:1 Global Policy 92 (2010).

27 McEwen, *supra* note 11, at 273.

28 Eric Blyth, *To Be or Not to Be? A Critical Appraisal of the Welfare of Children Conceived Through New Reproductive Technologies*, 16:4 International Journal of Children's Rights 501-510 (2008).

genetically related child, the "erosion of traditional notions about the structure of the family and the strides in reproductive techniques"[29] also arguably contribute to the popularity of surrogacy, including ICS.

Furthermore, the financial viability of ICS may also motivate commissioning parents to undertake such an arrangement. Undertaking an ICS arrangement in a developing state such as India or Thailand is in most cases significantly cheaper that undertaking a commercial surrogacy arrangement in the developed world in places where it is legally possible and regulated, such as some states in the United States.[30] Illustratively, the difference in cost margin has been reported as being up to as much as $78,000 (US).[31] Therefore undertaking surrogacy in a developing country where it is available to foreign commissioning parents is much more financially viable, and indeed attractive, for the majority of commissioning parents than commercial surrogacy options in the developed world.

Finally, the perceived legal flexibility of ICS may also be a motivating factor for commissioning parents to favour the option of undertaking surrogacy internationally rather than domestically. For example, Ryznar discusses the strict legal regulation in some states in the United States regarding surrogacy, and some of the legal outcomes, such as the *Baby M* case in which the surrogate mother's decision to not hand over the baby after its birth was upheld by the Supreme Court of New Jersey.[32] Ryznar argues that there is no doubt that "domestic cases like this one have increased the appeal of international commercial surrogacy."[33] However, despite the possible attraction of ICS due to what may be a prohibitively restrictive legal regime governing surrogacy in the home-state of the commissioning parents, the very existence of this domestic regulation of commercial surrogacy may still be problematic in terms of its ultimate impact on an ICS arrangement. The effect may be that in the home-state, such an arrangement is essentially held to be illegal, which can raise problems when commissioning parents attempt to return with a surrogate to a state such as France after undertaking an ICS arrangement in an offshore commercial surrogacy-friendly jurisdiction.[34] The commissioning parents,

29 McEwen, *supra* note 11, at 273.

30 *E.g.* Arkansas, Illinois, Florida, Nevada, New Hampshire, Texas, Utah, Virginia. Californian courts have consistently allowed commercial surrogacy under precedential case-law, there is no Californian legislation governing commercial surrogacy.

31 Amana Fontanella-Kahn, *India, the Rent-a-Womb Capital of the World: The Country's Booming Market for Surrogacy*, August 23, 2010, Slate, available at http://www.slate.com/id/2263136/ (last visited June 1, 2011).

32 Ryznar, *supra* note 6, at 1014.

33 *Id.*

34 Essentially, such cases raise conflict of laws issues. *See* for discussion of the Mennesson case (France/US), Gilles Cuniberti, *Flying to California to Bypass the French Ban on Surrogacy*, November 5, 2007, Conflict of Laws.net, available at http://conflictoflaws.net/2007/flying-to-california-to-bypass-the-french-ban-on-surrogacy/ (last visited June 1, 2011). Another interesting example worth noting is the introduction of the New South Wales Surrogacy

and therefore the child, may end up caught in a conflict of laws quagmire with no simple way out. To the extent to which this may raise human rights challenges, this possibility will be further discussed in the forthcoming second part of this article.

4.2 The surrogate mother

The role of the surrogate mother in an ICS arrangement is primarily to be the host to the surrogate child for the gestation period. In cases where she only hosts the child in this way, she is best understood as the biological carrier of the child. In some ICS arrangements, the surrogate's genetic material is also used. In such instances, she is both biologically and genetically linked to the child (and therefore this might be referred to as a full surrogacy). The other key role of the surrogate mother in ICS is that she is expected to, and sometimes is contractually bound (if there is a contract governing the ICS arrangement, this will be the expectation of the commissioning parents) to hand the baby over to the commissioning parents directly following its birth. This is done on the understanding that it is the commissioning parents who will assume responsibility for the child and raise the child, not the surrogate mother.

The surrogate is, like the commissioning parents, potentially motivated by various reasons to participate in an ICS arrangement. Some surrogates are motivated on purely compassionate grounds of wanting to help those unable to become pregnant themselves to have a child, whereas other surrogates are motivated by financial gain. This is understandable in the context of the developing world, where ICS arrangements have been recently characterised as a new type of "labour": ironic in that the very act of labouring to carry the child for 9 months, and the act of labour itself, are combined, in a form of work which is in many cases providing economically marginalised, poverty-stricken women an income they would have never otherwise have dreamed of.[35] In some cases however, surrogates might not participate in ICS by choice, but under external pressure. These issues will be further elaborated on in the discussion of women's rights in part two of this article.

Act 2010 (which came into effect on 1 March 2011), which makes it illegal to engage in commercial surrogacy arrangements within the territory of NSW or outside NSW, including undertaking ICS overseas.

35 Pande first explicitly characterised ICS as a new and particular type of "labour". *See* Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35:4 Signs: Journal of Women in Culture and Society 989-992 (2010). ICS can be viewed as a literal nine months of "labour" ending in the "labour" of child-birth.

4.3 The child

The child who is born from an ICS arrangement is of central importance: essentially the child is the product which the commissioning parents commission, the surrogate nourishes and produces, and the commissioning parents then take 'ownership' of. The child is therefore vulnerable as a potential cite of contestation; the rights and interests of the child are one of the central concerns of the author's research, and will be discussed more extensively part two of this article.

4.4 The medical staff and surrogacy broker

Some ICS cases are private arrangements not carried out with the assistance of a medical clinic specialising in surrogacy, whereas others utilise such services. Whilst such clinics have existed in some states of the United States of America for many years, more pertinent to the current ICS market is the emergence of such clinics in developing states. The business of many of these clinics in the ICS field shows no sign of slowing in growth.[36] Such clinics may also orchestrate the financial transactions for the arrangement, receiving money from the commissioning parents, and in cases where the surrogate is being paid, the payment to the surrogate may be funnelled through the clinic as part of a larger transaction. Such clinics' medical staff deal with ICS arrangements on a daily basis, and in many instances rely on ICS brokers employed not only to recruit surrogates, sometimes using undue pressure,[37] but who are also tasked with matching surrogates to commissioning parents.

The notion of the surrogacy broker should also be understood more widely as encompassing the many ICS brokerage businesses functioning widely through the internet, promoting the various international surrogacy options to prospective commissioning parents. This highlights the role played by modern communication technologies (and their centrality to many ICS arrangements), which enable prospective commissioning parents to access information about potential surrogacy arrangements available on the other side of the world via simple mouse-clicks; in extreme instances, such arrangements may be conducted entirely remotely, with the commissioning parents often erroneously believing it is as simple as flying in to collect the child once it is born. Such instances emphasise the often made-to-order nature of ICS.

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36 *E.g.* the Ankanksha Infertility Clinic run by Dr. Nayna Patel which is one of the subjects of *Google Baby*, *supra* note 16, and the Hope Maternity Clinic run by Dr. Usha Khanderia, discussed by Pande, *supra* note 35. Both clinics are located in Anand in the state of Gujarat in India.

37 Pande, *supra* note 35, at 975ff.

5 Brave new world: the bioethical and moral conundrums of international commercial surrogacy and the interface with health law issues

The scope of this article does not extend to engaging in a full discussion of the ethics of ICS. However, brief discussion of the core bioethical and moral conundrums provides an essential contextual prism through which to frame and view any legal and human rights focused analysis of ICS. As Wendy Chavkin states,

> 'The biology of reproduction has clearly become fragmentable, with gestation and organs and gametes and intracellular ingredients and genetic components now separable. The meanings accorded to these bits and processes is both highly varied and contested.'[38]

Already, the terms "world babies" and "designer babies" are being applied to the children born from ICS arrangements. Surrogates have been referred to as "rentable wombs" and part of "baby-farming" schemes or "baby factories".[39] Brief discussion of some of the core bioethical and moral issues thus provides a primer for later discussion of the human rights challenges posed by ICS for surrogate women and children (contained in part two of this article).

The first bioethical issue raised by ICS relates to the commercialisation of human reproduction. Discussing the increasing numbers of American couples seeking to engage Indian surrogates to carry a child for them in India, Lee notes that "this practice raises ethical concerns, indicating that U.S. outsourcing is no longer limited to manufacturing and service jobs, but has expanded to include women's biological and reproductive bodily functions."[40] The ethically problematic aspect of international surrogacy in this respect is expanded upon by McEwan who observes "While placing a monetary value on a product or service seems natural in many areas of society, it presents new challenges when introduced into the reproductive arena. [… gestational surrogacy has] brought into question the ethics of paying women to bear children and the potential for exploiting surrogates through those payments."[41] Essentially, what this aspect of the discussion around ICS boils down to are the problematic bioethical issues caused by the creation of human life through biotechnological advances, and the commodification of the body, where babies are part of a human trade

38 Wendy Chavkin and Jane Maher (eds.), *The Globalization of Motherhood: Deconstructions and Reconstructions of Biology and Care*, 12 (2010).

39 *E.g. see* SBS Australia, *India's Baby Factory, Dateline Transcript*, available at http://www.sbs.com.au/dateline/story/transcript/id/600008/n/India-s-Baby-Factory (last visited June 1, 2011).

40 Lee, *supra* note 2, at 278.

41 McEwen, *supra* note 11, at 272.

and where women are, some would say, reduced to a means of production to be utilised to this end.[42]

A second bioethical and moral challenge raised by ICS is the issue of technological intervention in and on the body, and the extent to which this is permissible from an ethical viewpoint. As Gupta and Richards state, "By facilitating greater degrees of intervention on the body, technology unsettles our knowledge of what bodies are and puts to test our ability to make moral judgments about how far science should be allowed to reconstruct the body."[43] At its extremes, this bioethical issue ventures into the area of issues of the post-human body, and where technological intervention may eventually lead in the future.[44]

Thirdly, and interrelated to the abovementioned issue, the extent to which ICS may sometimes be seen (in part) to be an exercise in eugenics raises pressing ethical and moral questions. For example, to what extent should commissioning parents be able to select aspects such as the race and sex of the child they commission through ICS? Further, to what extent should commissioning parents be able to make decisions such as whether to abort a child being carried by a surrogate who is found during gestation to have a genetic disability or disease, or simply doesn't carry the specific characteristics or sex desired by the commissioning parents? Whilst these may seem like extreme cases, there exists very real potential for such practices to eventuate within the paradigm of ICS. Indeed, the already existing sex-selective abortion practices in natural childbirth in India and China highlight that this is not a theoretical possibility. Such potential in ICS will touched on further at the end of this article in a brief discussion of rights balancing in ICS. Furthermore, the ethical aspects of whether the practice of ICS can be seen to be exploitative of women is a large issue at a more general level, but will be discussed further in part two of this article from a public international law human rights perspective.

Finally, it is worth noting that governments are often unwilling to discuss issues such as ICS due to the fraught nature of the bioethical and moral issues raised, which are often viewed as alienating and highly controversial within public debate. This is perhaps one of the main reasons why the majority of democratic governments to date have assumed a hands-off approach when it comes to taking a position on ICS (effectively therefore not taking a position). However, the on-going uptake of ICS by citizens from various jurisdictions

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42 *See generally* Jyotsna Agnihotri Gupta and Annemiek Richters, *Embodied Subjects and Fragmented Objects: Women's Bodies, Assisted Reproduction Technologies and the Right to Self Determination*, 5 Bioethical Inquiry 240-241 (2008).

43 *Id.* at 248.

44 *See* for a comprehensive exploration of the potential posthuman future, F. Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (2003). *See* for insight into the impact of the notion of posthuman humanity on the law and on judging, Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in a Post-Human Era*, 78:5 New York University Law Review 1581 (2003).

throughout the world is likely to continue to come into conflict with this legislative and policy-development and political reticence, and the bioethical and moral issues are likely to increasingly come to the fore as topics on the agenda for public debate. Lee expands, "When most surrogacy agencies are focused solely on the economic gain, the significant social, political and ethical considerations surrounding commercial surrogacy become more urgent."[45] However, it should also be noted at this point that it is unlikely that the many challenges of ICS can be adequately addressed through treating it as an issue which can be addressed by national legislative and policy measures in the first instance, as Lee predominantly argues.[46] Rather, without international impetus, national legislatures are likely to be reticent to holistically addressing ICS. Indeed, given that ICS functions through what are primarily private businesses providing the services of ICS, there may be little motivation in some states with lower levels of transparency and good governance to pass laws or establish policies which might impact on the profitability of the ICS market. This said, if a private international law framework is to work in this area to provide global regulation of ICS, as is envisaged as a possibility,[47] two key things can be said at this stage regarding what it will need to work.

Firstly, it will require willingness from national governments to submit to such regulation, and in turn will require national legislatures to enact implementing legislation or policies to give effect to such a regulatory framework. Secondly, it will require the wider support of complementary implementation of public international law human rights standards, to ensure a holistic protective regime for those most impacted by ICS, being the women and children involved.

6 Human rights protection: when is a child a child?

One of the central concerns of part two of this article is an examination of the rights and interests of the child who is produced by ICS arrangements. In order to be able to progress to discussion and analysis of children's rights in this context, it is first necessary to briefly consider the legal question of "when is a child a child?" Granted, this question could be treated as a stand-alone research topic in itself, and will be explored in the context of ICS in more depth in future research. At this juncture, this article intends only to provide a brief introduction to this question in the ICS context; more research and work on this aspect of ICS will form part of the author's future work on the wider topic.

The question of when is a child a child presents a highly fraught area; indeed, there exist "great differences in opinion about the legal protectability

45 Lee, *supra* note 2, at 281.
46 *Id.* at 300.
47 *See* the current project at the University of Aberdeen, *supra* note 23.

of [the unborn] child."[48] However, consideration of this question is necessary to be able to assess when legal protection of a child begins, and therefore when a child's rights can be the subject to the protection of public international law and the body of children's rights law. Cornock and Montgomery provide a helpful starting point in this assessment, noting that "When considering the legal rights of the unborn child, the questions that the law has to address are: what is the legal status of the unborn child and when does the child's legal personality begin?"[49] At the domestic level, this issue is a matter for national legislatures. Bainham writes that "The beginning of childhood raises directly the status of the foetus or unborn child. English law generally takes the position that personhood is established at birth and not before."[50] He also notes that in the US, a similar view is taken to the English position, and as confirmed in the landmark case of *Roe v Wade*,[51] the unborn child is not a person under the US Constitution.[52] However, the effect of this is not to say that no legal protection is extended to the unborn child, but that if it is, that protection is not provided on the basis of a status of personhood or childhood.[53]

At the international level, the United Nations Convention on the Rights of the Child (CRC) defines a child as meaning "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[54] The use of the ambiguous term "human being" leaves it open to individual States Parties to determine whether or not an unborn child can be brought within the scope of the Convention, and as to what level of legal protection would be afforded to children in the embryonic or foetal stage during gestation.[55] However, what adds a further level of complication to the position taken by the Convention regarding the rights protection of the unborn child, is the following statement found in the preamble (citing a preambular paragraph of the Declaration on the Rights of the Child[56]) which reads: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".[57] This seems to indicate that the unborn child falls under the protection of the Convention, yet this is ambiguous in light of Article 1, which appears to rule this out, with its use of the term "human being". How-

48 J.H.H.M Dorscheidt, *The Unborn Child and the UN Convention on Children's Rights: the Dutch Perspective as a Guideline*, 7 International Journal of Children's Rights 303 (1999).
49 Marc Cornock and Heather Montgomery, *Children's Rights In and Out of the Womb*, 19 International Journal of Children's Rights 4 (2011).
50 Andrew Bainham, *Children: The Modern Law* (3rd ed.), 86 (2005).
51 *Roe v Wade,* 410 US 113 (1973).
52 Bainham, *supra* note 50, at 86.
53 *Id.*
54 United Nations Convention on the Rights of the Child, art, 1, Nov. 20, 1989, 1577 U.N.T.S. 3.
55 Dorscheidt, *supra* note 48, at 303.
56 Declaration on the Rights of the Child (adopted by UN General Assembly Resolution 1386 XIV), Dec.10, 1959).
57 United Nations Convention on the Rights of the Child, preamble, supra note 54.

ever, as posited by Joseph, arguably the fact that this sentence appears in the preamble is crucial, as "what is stated in a preamble is by way of foundation and motivation for the substantive content of the relevant document."[58] Extending this view to its logical end, it is arguable that the CRC does not necessarily exclude the unborn child from its scope of protection. Joseph takes a more absolutist position: "The inescapable conclusion here is that the child before as well as after birth is to be protected by the CRC, if that Convention is interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[59]

However, leading jurisprudence in this area does not appear to accept such an absolutist position. Under the European Convention on Human Rights (ECHR), it has been established in the cases of *Vo v France*[60] and *Evans v United Kingdom*[61] that the unborn child does not have a right to life (safeguarded for "everyone" in Article 2 of the ECHR), and therefore is not afforded the human rights protection of the Convention. As Katherine Freeman wrote insightfully prior to these judgments, "If the European Court of Human Rights were to find that "everyone" includes unborn human beings, and therefore "[e]veryone's right to life" protects the unborn child, the abortion laws of many member states would then be held in contravention of the European Convention."[62]

A final aspect of the issue of when is a child a child is the fact that tensions also exist between the protection of the unborn child and the protection and rights of the mother who carries the child, and at a further extension, the rights of the father. In characterising this issue, Cornock and Montgomery observe it can be asked which rights have priority should a conflict arise between the two.[63] In English law, the position is held that the rights of the mother override the unborn child should the two come into conflict (for example in the case of medical treatment). This is "based upon the concept that the foetus is part of the woman's bodily integrity until such a time as it has been born and is independent of the woman. Until that point the woman's consent is sufficient for treatment to her and also the foetus. The father has no rights regarding treatment that is necessary for the benefit of the unborn child if the mother will not consent to the medical treatment."[64] The English case of *Paton v United Kingdom* saw the then European Commission of Human Rights earlier holding this position regarding the legal inability of a prospective father

58 Rita Joseph, *Human Rights and the Unborn Child,* 4-5 (2009).
59 *Id.* at 6.
60 *Vo v France,* (2005) 40 EHRR 12.
61 *Evans v United Kingdom,* Application no. 6339/05, Grand Chamber judgement (2007).
62 Katherine Freeman, *The Unborn Child and the European Convention on Human Rights: To Whom Does "Everyone's Right to Life" Belong?,* 8:2 Emory International Law Review 616 (1994).
63 Cornock et al, *supra note* 49, at 8.
64 *Id.* This position was made clear in *St George's Healthcare NHS Trust v S,* [1998] 2 FLR 728.

preventing the unborn child's mother from having an abortion. The effect of this was that the unborn child's rights will be outweighed by the mother's rights.[65] Discussion of this aspect will become further relevant in discussions of rights balancing in ICS, a topic that the author will engage with in future writing on this topic.

Therefore what appears apparent in answer to the question under law as to "when is a child a child?" is that this is an area open to interpretation, however one which the courts, both at the national and international level, have taken the position that it is usually the case that the unborn child is not afforded rights protection; rather, that protection begins at birth, and until that point in time, the balance, should rights conflict, tips in favour of the mother. Yet, ambiguity exists, with some arguments able to be made that a child should also be understood as including an unborn child for the purposes of the CRC; indeed the Committee on the Rights of the Child appeared to – intentionally or not – assume this position with its issuance of General Comment no. 7, which cited the act of sex selective abortion as one which may violate the right to non-discrimination under Article 2,[66] sex-selective abortion being an act which occurs in respect of the unborn child. As previously mentioned, it is not the within the scope of this article to focus in-depth on this question. However, the core point to be made here is that in the area of ICS, it is worth keeping in mind the notion of the child as possibly encompassing both the unborn and born child in the subsequent consideration of rights protection in the context of commodification and the vulnerability of women's and children's rights. Moreover, it is paramount to remember that in all the possible models illustrated in Figure 1 (above), a child is the ultimate outcome, and no matter what model of ICS that child is the product of, that child has certain rights, as does the surrogate mother who carries him or her. In part two of this article, the rights provided under public international law to these groups are identified, in order to subsequently be able to assess how ICS may pose specific challenges to these rights and interests.

65 *Paton v United Kingdom*, (1980) 3 EHRR 408. The Commission said at para. [19] that "The 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman."

66 Committee on the Rights of the Child, *General Comment No. 7 Implementing Child Rights in Early Childhood*, para. 11(b) (2005).

3 Contextualising a 21st Century Challenge Part Two

Public International Law Human Rights Issues: Why Are the Rights and Interests of Women and Children at Stake in International Commercial Surrogacy

Abstract

Public international law provides an important lens through which to deal with ICS as a twenty-first century human rights challenge, given the range of human rights issues arising through this method of family formation, and the framework for protection provided by international human rights law. Indeed, one of the main tenets of this study is the value of the CRC to ensuring children's rights are protected and upheld in ICS. This Chapter therefore introduces the rights and interests most at stake in ICS for the two most vulnerable parties from a human rights perspective: surrogate mothers and children who are conceived and born through ICS. It demonstrates that some of the human rights challenges faced by children in ICS are interrelated to those sometimes experienced by surrogates. This Chapter develops understanding of why the rights of women and children are at stake in ICS; the child's rights situation in particular will be examined more deeply in later chapters of this study.

Main Findings

- Children born through ICS can face practical problems following birth which pose risks to their human rights. At particular risk are children's rights to nationality; identity preservation; and to not be discriminated against.
- Surrogate mothers in ICS can also face risks to their human rights, including their reproductive autonomy and rights, and their rights not to be exploited and/or trafficked.
- The risks of human commodification and human trafficking are challenges common to both children and surrogate women in the context of ICS.
- Judicial decision-making in ICS cases should, based on the individual facts of a case, be child-centred to ensure the rights and best interests of children are protected and upheld, while balancing these with other parties' rights.

Contextual notes

- This Chapter was written at a time when very limited scholarly works had considered the situation of children in ICS, but a multidisciplinary body of work existed concerning the situation of surrogate mothers in ICS.
- At the time it was written, this Chapter was one of the first analyses of children's rights in ICS from an international human rights law perspective.
- It was also one of the first scholarly works presenting analysis in one place of the children's rights and women's rights challenges raised by ICS.
- Since the time this Chapter was written, although legal scholars and international bodies have increasingly engaged with ICS from a child rights perspective, a close focus on the child's rights in ICS remains limited; ICS jurisprudence at domestic and regional levels has developed; and the situation of children born through ICS has come under greater scrutiny from international media. The rights of surrogate women in ICS have continued to receive attention from multidisciplinary scholars, domestic courts and international media.
- However, children's and women's rights continue to be at risk and infringed in ICS, and a lack of international regulation persists, as does a lack of international consensus about ICS as a practice.

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1 Introduction

Building from the first article in this series, the present article discusses some of the core challenges posed by international commercial surrogacy (ICS) arrangements to the rights of children and women. Given the lack of comprehensive consideration of children's rights and how they are impacted and affected by ICS to date, primary emphasis is placed on discussion of why ICS should be recognised as an international human rights problem affecting children. As part of this discussion, relevant case law from various international jurisdictions are touched upon. The challenges to women are the secondary focus of the article, and issues cutting across both groups are dealt with together in a discrete subsection. All of the issues raised in this article have significant public policy dimensions in addition to legal facets, and elaborate on the issues raised in the discussion of bioethical challenges posed by ICS in part one of this article. As Ryznar notes, "it would be very difficult, and perhaps unwise, to consider only the legal framework of international commercial surrogacy while ignoring public policy goals. Should surrogacy remain legal, these public policy considerations center on protecting the three primary groups of people involved in international commercial surrogacies:

the surrogates, the commissioning parents, and the resulting children. It is therefore vital to analyze the rights, interests and obligations of these parties. Naturally, they vary, but each has implications for the potential regulatory framework".[1]

2 Children's Rights

One of the most striking aspects of research undertaken to date on ICS is the lack of in-depth attention given to the position of the children involved and who ICS ultimately produces. Instead, attention largely falls on the situations of the commissioning parents or the surrogate mother. This is not to say that there are not some notable exceptions of scholarship focussed on ICS or directly related issues – there are,[2] but more comprehensive thought needs to be given to how ICS affects children. This article seeks to make a preliminary contribution to this on-going work, and to what is hoped is further work in this area by a range of legal scholars and practitioners. This will add to and complement the body of work already further established in other disciplines (such as social work and sociology) on ICS. As Michael Freeman observed in 1996, "Assisted reproduction has hitherto neglected a children's rights perspective – and it shows. There has been no systematic exploration of the questions it raises which has put children, their interests and rights to the forefront."[3] In 2011, this equally applies to the ICS context. Indeed, assessment of the situation of the commissioning parents and surrogate mothers is essential to understand the overall picture. However, the importance of inserting the children born from ICS into the centre of discussion of these arrangements is crucial, to highlight the pressure points where their rights may be particularly vulnerable to violation. It must always be remembered that all the scenarios depicted in Figure 1 (see part one of this article) result in the creation of a child. As Fuku-

1 Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43(4) John Marshall Law Review 1024 (2010).

2 *E.g. see generally* Eric Blyth, *To Be or Not to Be? A Critical Appraisal of the Welfare of Children Conceived Through New Reproductive Technologies,* 16:4 International Journal of Children's Rights 501-510 (2008); Michael Freeman, *The New Birth Right? Identity and the Child of the Reproduction Revolution*, 4 International Journal of Children's Rights 273-298 (1996); George Palattiyil, Eric Blyth, Dina Sidhva and Gita Balakrishnan, *Globalization and Cross-border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work*, 53 *International Social Work* 686-670 (2010); Ryznar, *supra* note 1; and Mary Lyndon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption and Same-Sex and Unwed Parents* (2001). Shanley states at 104 "While contract pregnancy clearly can be viewed from the perspective of those who commission a pregnancy, I put the woman who bears the foetus, and the child who will be born, at the centre of my analysis."

3 M. Freeman, *The New Birth Right? Identity and the Child of the Reproduction Revolution*, 4 International Journal of Children's Rights 297 (1996).

yama and Furger write regarding bioethics and human reproduction, "Since reproduction aims at the creation of children, their welfare ought to be placed first and foremost as an objective of regulation."[4] Therefore an assessment of the most significant ways in which children's rights may be breached through ICS follows.

2.1 The immediate practical problems for children born from international commercial surrogacy arrangements

In many ICS cases, commissioning parents do not adequately foresee the practical implications and consequences that their actions will have for the child they have commissioned. Things many commissioning parents assume will be taken for granted after the child's birth (for example, who the legal parents of the child will be, and what eligibility for citizenship the child will have) can become highly problematic. Thus, unforeseen complications can dominate immediately following an ICS birth. As Hedley J. (the United Kingdom judge who has been most active in the international surrogacy area) recently said, "I have been extremely anxious about the difficulties people have got themselves into […] without appreciating the legal implications of doing so. […] a number of people have found themselves getting into a mess unnecessarily and their children into a mess unnecessarily".[5]

These complexities arise because of the international nature of the surrogacy arrangement; the involvement of parties from two different – or sometimes more –jurisdictions brings cross-border issues into play, along with a raft of potential conflict of laws issues. Problematic situations often occur when the home state of the commissioning parents bans commercial surrogacy, and they undertake an ICS arrangement in a foreign jurisdiction. In these cases the law of the home state may take a different view of issues which affect the child (such as who the legal parents are) than the position taken by the law of the state where the child is born. Storrow captures the practical issues likely to arise in many ICS cases, given the legal lacuna in this area: "The children born of international surrogacy tend to be born in the host country. The intending parents must obtain travel documents to return with their new children to their countries of origin. […] A government intent on curtailing cross-border surrogacy may refuse to issue a passport or visa to the child, may not bestow citizenship upon the child and may refuse to recognize the intended parents

4 Francis Fukuyama and Franco Furger, *Beyond Bioethics: A Proposal for Modernizing the Regulation of Human Biotechnologies*, 4 (2006).

5 BBC Radio 4, *Interview with Mr Justice Hedley of the High Court of the UK*, May 19, 2011, The World at One. An unofficial transcript of the interview is available at http://www.nataliegambleassociates.com/assets/assets/interview.pdf (last visited June 1, 2011); a report on the interview is available at http://www.bbc.co.uk/news/uk-13452330 (last visited June 1, 2011).

as the legal parents of the child. Problems can also arise in host countries where the law does not automatically entitle the intending parents to recognition as the legal parents of the child."[6] Therefore these immediate challenges after birth are essentially issues of legal status, which can create "legal limbo"[7] for the child (and by extension the commissioning parents). Given the nature of these issues it may seem most appropriate to resolve such issues through domestic legislation and from a private international law perspective.[8] However, they are also important to consider from a public international law standpoint, as these practical problems very much raise the question of what is in the best interests of a child born from an ICS arrangement. As Article 3(1) of the Convention on the Rights of the Child states:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Therefore, in any actions of the kind described in Article 3(1) which are taken to resolve the situation of an ICS child regarding their relationship to their commissioning parents, their citizenship, ability to travel internationally or their welfare, the best interests of the child should be treated as a primary consideration.

Some recent judicial decisions where these issues have been at stake illustrate how the child's best interests might be assessed and practically applied. The UK High Court handed down a landmark international surrogacy decision in 2010, *RE: L (A minor)*.[9] In this case, British commissioning parents had commissioned a surrogate in Illinois, who had provided them with a baby, L. At issue was whether the commissioning parents could be recognised as L's legal parents, and whether the Court would recognise the ICS agreement, given payments to a surrogate other than 'reasonable expenses' are illegal under UK law.[10] In this instance a parental order was made in favour of the commissioning parents being L's legal parents. Hedley J. highlighted other practical difficulties, noting:

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6 Richard Storrow, *Assisted Reproduction on Treacherous Terrain: The Legal Hazards of Cross-border Reproductive Travel*, 23 Reproductive BioMedicine Online 543 (2011).

7 Louisa Ghevaert, *International Surrogacy: Progress or Media Hype?*, 590 BioNews (2011) available at http://www.bionews.org.uk/page_85684.asp (last visited June 1, 2011).

8 Indeed, these are the types of issues being considered by a current research project at the University of Aberdeen, led by Professor Paul Beaumont and Dr. Katarina Trimmings. The project is called "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level" and is supported by the Hague Conference on Private International Law. Background to the research is available at http://www.abdn.ac.uk/law/surrogacy/index.shtml (last visited June 1, 2011).

9 *RE: L (A minor)*, [2010] EWHC 3146 (Fam).

10 UK Human Fertilisation and Embryology Act 2008, section 59(4) amending s42(2) of the Surrogacy Arrangements Act 1985.

> '[…] there still remain real issues about re-entry to the UK although in this case it was effected through temporary leave granted to the child who had a USA passport. It remains essential for each commissioning couple to acquaint themselves with their immigration position before committing themselves to a surrogacy agreement.'[11]

Standing as one of a small handful of legal decisions on ICS internationally (at the time of writing in 2011 only two others have been decided in UK courts),[12] the decision in *RE: L* is important in a number of respects. Firstly, it highlights the range of legal issues requiring resolution in ICS cases regarding the status of both the child and the commissioning parents, in relation to each other (and for the child in general).

The second important aspect of the *RE: L* decision (arguably the most important given potential wider impact on other cases) is that the judgment explicitly considered the welfare of the child to be the paramount consideration, and in this case the welfare of the child was found to outweigh public policy considerations regarding payments in surrogacy arrangements:

> 'It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an [parental] order if otherwise welfare considerations supports its making. It underlines the Court's earlier observation that, if it is desired to control commercial surrogacy arrangements, those controls need to operate before the court process is initiated i.e. at the border or even before.'[13]

By holding that the welfare of the child is the paramount concern, the UK courts have thus to date taken a child-centred approach to ICS cases. However, the Court also made the important observation regarding the commercial aspect of international surrogacy arrangements that each case must be scrutinised on its own facts, given the impossibility of pinning down a conventional quantum of payment.[14] Indeed, the case-by-case consideration of ICS cases in national courts (regarding matters such as these practical issues which ensue immediately after birth of an ICS child) means there will remain an element of unpredictability in judicial decision-making in this area.

A second case illustrating the comprehensive practical problems for a child immediately following their birth from an ICS arrangement is the case of *Baby Manji*.[15] The commissioning parents, the Yamadas, were from Japan and

11 *RE: L (A minor),* [2010] EWHC 3146 (Fam) para. [8].
12 *See* the earlier cases *RE: X and Y (Foreign Surrogacy),* [2008] EWHC 3030 (Fam), and *RE: S (Parental Order),* [2009] EWHC 2977 (Fam).
13 *RE: L (A minor), supra* note 11, para. [10].
14 *Id.,* para. [7].
15 *Baby Manji Yamada vs. Union of India & ANR*, [2008] INSC 1656 (29 September 2008).

entered into a surrogacy contract through a prominent Indian surrogacy clinic.[16] An embryo was created using Mr Yamada's sperm and the egg of an anonymous Indian donor, and implanted into an Indian gestational surrogate. Manji was born in July 2008 however the Yamadas divorced a month earlier. Mr Yamada wanted to care for Manji; Mrs Yamada did not.[17] As Kari Points describes,

> 'The way she saw it, she was unrelated to the baby biologically, genetically and legally. Under the terms of the agreement with the clinic, the egg donor's responsibility had ended once she provided the egg, and the surrogate's job was finished as soon as she gave birth. Suddenly, Baby Manji had three mothers – the intended mother who had contracted for the surrogacy, the egg donor, and the gestational surrogate – yet legally she had none. Was she Indian? Was she Japanese? Could she have an identity and a nationality without having a mother? The surrogacy contract did not cover a situation such as this. Nor did any existing laws help to clarify the matter.'[18]

Following diplomatic wrangles, the matter was heard by the Supreme Court of India.[19] It directed the relevant Indian government departments to deal with the case expeditiously however, the Supreme Court did not enter into any discussion of the best interests of the child. Eventually, identity documents enabling travel to Japan were issued by the Indian government as an ad-hoc solution, and a temporary one year visa was issued by the Japanese government on humanitarian grounds, allowing entry to Japan.[20] Thus, the difference in focus between the approach taken by the Indian Supreme Court and the UK High Court in the two cases discussed can be contrasted; the UK Court demonstrating a proactive, child-centred approach, whilst the best interests of the child were seemingly a peripheral concern for the Indian Supreme Court, leaving Manji in a vulnerable position.

2.2 The potential for statelessness

Related to the practical matters which may affect the child immediately after birth, the very real potential of an ICS child ending up as being stateless requires consideration. The implications of statelessness are large for anyone, but for a child they may be further magnified. A child in an ICS arrangement

16 The Ankanksha Infertility Clinic in Gujarat.

17 *See* for a full factual outline of the case and a discussion of the case from an ethical point of view, Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji,* available at http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf (last visited June 1, 2011).

18 Points, *supra* note 17, at 2.

19 *Baby Manji Yamada vs. Union of India & ANR*, *supra* note 15.

20 Points, *supra* note 17, at 6-7.

may end up stateless if the country of its birth and the commissioning parents' country (or countries) of citizenship refuse recognition. Essentially baby Manji (discussed above) was left stateless given the refusals of both the Indian government to issue a passport, and the Japanese government to recognise citizenship.

Further instances of statelessness have arisen in the Indian ICS context. One case, *Balaz v Anand Municipality*, involved German commissioning parents who contracted an Indian surrogate mother to carry a child for them.[21] Twins Nikolas and Leonard were born in 2008 in India however they remained stateless for two years.[22] The twins were confined to India, whilst their commissioning parents engaged in lengthy endeavours to regularise the twins' situation to enable them to go to Germany. Eventually the case was resolved by requiring the commissioning parents to adopt the twins through intercountry adoption (by exception to usual intercountry adoption policy), in order for them to be able to leave India and enter Germany.[23] Travel visas were then issued by the German government;[24] therefore the issue of statelessness of children born from ICS was not explicitly confronted.

A similar situation has arisen in another Indian ICS arrangement, involving a Norwegian commissioning mother who contracted a surrogate mother in Mumbai. After implantation of an embryo created using sperm from an anonymous Scandinavian donor and an egg from an anonymous Indian donor, twins were born in January 2010. However, Norway refused travel documents for the children given DNA tests showed no genetic link between the commissioning mother and the twins (therefore Norway recognises the surrogate mother as the legal mother).[25] The Indian government takes the opposite position (that the commissioning mother is the legal mother), and refuses recognition of the twins as Indian nationals.[26] In contrast to the *Balaz* case, the Norwegian government says adoption is not an option open to the commis-

21 *Balaz v Anand Municipality*, High Court of Ahmedabad (November 11, 2009).

22 *See* Dahananjay Mahapatra, *German Surrogate Twins to Go Home*, May 27, 2010, Times of India, available at http://articles.timesofindia.indiatimes.com/2010-05-27/india/28279835_1_stateless-citizens-balaz-surrogate-mother (last visited June 1, 2011).

23 Rakesh Bhatnagar, *Adopt Surrogate Twins, SC Tells German Couple*, January 18, 2010, Daily News and Analysis, available at http://www.dnaindia.com/india/report_adopt-surrogate-twins-sc-tells-german-couple_1336403 (last visited June 1, 2011).

24 Hillary Brenhouse, *India's Rent-a-Womb Industry Faces New Restrictions*, June 5, 2010, Time Magazine, available at http://www.time.com/time/world/article/0,8599,1993665,00.html (last visited June 1, 2011); Times Now, *German Twins Leonard, Nikolas Granted Visa*, May 16, 2010, Times of India, available at http://www.timesnow.tv/articleshow/4346013.cms (last visited June 1, 2011).

25 Sumitra Deb Roy, *Divergent Laws Leave Twins Stateless*, February 2, 2011, Times of India, available at http://articles.timesofindia.indiatimes.com/2011-02-02/india/28380051_1_fertility-clinic-twins-crime-branch (last visited June 1, 2011).

26 *Id.*

sioning mother.[27] At the time of writing of this article, the case remains unresolved, the twins remaining stateless in India.[28]

The UK High Court has also been confronted with cases involving stateless children born from ICS arrangements. A good example is the case of *RE: IJ (A Child).*[29] The case involved UK commissioning parents who had a child born in Ukraine to a Ukrainian surrogate mother in 2010 through an ICS arrangement (an embryo created using the sperm of the commissioning father and the egg of an anonymous donor was implanted). Again, difficulties arose in the areas of legal parentage and citizenship; the child was left stateless for a period of time, as a result of the different positions of the respective Ukrainian and UK laws pertaining to surrogacy. A similar situation arose earlier in the UK case of *RE: X & Y (Foreign Surrogacy)*.[30] In that matter, a UK commissioning couple entered into a contractual arrangement with a surrogate in Ukraine; again an anonymous egg was fertilised with the commissioning father's sperm and implanted, and twins were born. Similar problems ensued as in *RE: IJ*. Hedley J. importantly stated in the *RE: X&Y* decision that "As this case vividly demonstrates, not only may (and probably will) those laws be different but they may be incompatible to the point of mutual contradiction."[31] Effectively this left the twins without clear parents or nationality, the ultimate impact being they were, for a time, stateless.

These cases of child statelessness resulting from ICS are particularly problematic when viewed in light of Articles 7(1) and 7(2) of the United Nations Convention on the Rights of the Child (CRC).[32] What the cases illustrate is that States Parties to the CRC have displayed a large degree of reticence regarding recognition of the child's rights in ICS cases, as required by Article 7(1). In particular, the right to acquire a nationality from birth and to ensure implementation of these rights where the child would otherwise be stateless have been neglected. Arguably in some of the cases discussed above, states have breached their obligations under Article 7, given that children have not had their right to nationality from birth fulfilled (in some cases waiting for over

27 R. Kumari, Complications of Surrogate Motherhood in India, Gender Matters India (28 January 2011), (http://csrindia.org/blog/2011/01/) (last visited 1 June 2011).

28 However, the case has apparently not had the effect of dissuading Norwegian commissioning parents from seeking ICS in India, with a reported marked increase during 2011, *see* Views and News from Norway, *Indian Surrogates for Norwegian Women Increase*, (23 March 2011) (http://www.newsinenglish.no/2011/03/23/indian-surrogates-for-norwegian-women-increase/) last visited 1 June 2011.

29 *RE: IJ (A Child),* [2011] EWHC 921 (Fam).

30 *RE: X and Y (Foreign Surrogacy),* [2008] EWHC 3030 (Fam).

31 *Id.* at para. [3].

32 Article 7(1) states that the child shall be registered immediately after birth, and have the right to a name and nationality from birth, and to know and be cared for as far as possible by his/her parents; Article 7(2) requires States Parties to ensure implementation of these rights, emphasising this should be done in particular where the child would otherwise be stateless.

two years). Moreover, Article 7(2) emphasises that Article 7(1) rights are particularly important in cases where, if those rights are not fulfilled, the child would otherwise be stateless. This has been the outcome in many cases like those discussed above; states should therefore be doing much more to ensure these rights are fulfilled.

2.3 The commissioned child as a contested or unwanted child

Given the situations a child born from an ICS arrangement may face following birth (as discussed above), it can be posited that in extreme cases, these children end up falling into one of two categories. Firstly, the child may best be understood as a 'contested child': where more than one party claims the child, for example estranged commissioning parents who may both lay claim to the child, or a surrogate mother changes her mind refusing to provide the baby to the commissioning parents, acting against any contractual agreement. A second alternative is that the child may be an 'unwanted child': when born, neither the commissioning parents nor the surrogate are willing to take responsibility for the care of the child. Such a situation may arise for a number of reasons, for example in instances where the commissioning parents have lost interest in parenting a child, or perhaps if the child is born with a birth defect or disability. Both contested children and unwanted children who are products of ICS arrangements will likely face social and legal uncertainty in the early phase of their life, and will continue to experience the impact of these situations as they grow older and potentially throughout their lives. Their status as a contested or unwanted child may well have an impact on their sense of personal identity, a separate but related issue which will now be examined.

2.4 The child's right to identity

The right to identity is likely to be highly relevant in almost all cases of ICS, given the unique circumstances surrounding birth, and the child's particular situation post-birth (as mentioned above, the position of the child immediately following birth can be highly variable, sometimes precarious). Indeed, this issue merits further research and discussion in the future given its importance in the context of ICS, and the author intends to engage in such a project. For the purpose of the current article, it can be said that two factors based on the nature of ICS mean that such arrangements will likely have a distinct impact on the child's right to identity.

Firstly, in many ICS arrangements, the child will either have only a half genetic link to the commissioning parents, or no genetic link to the commissioning parents. Often genetic material is anonymously donated; in some cases

the surrogate mother may also be acting anonymously. Secondly, the international nature of the surrogacy arrangement means the child is likely to grow up in a place and culture that may be geographically distant from the place they were born, and culturally dislocated from their ethnic and cultural origins. This will be especially marked where commissioning parents from developed states use surrogate mothers in developing states.

Identity is a contested notion; as Blauwhoff notes, its multidimensional nature means "it comes as no surprise that identity has so far not been given a legal definition."[33] However, it is widely agreed that identity is an important concept in relation to a person's sense of self; it is through the concept of narrative identity – based on understandings of the past, and memory – that we construct our own notions of personal identity. Michael Freeman therefore describes identity as

> '[…] what we know and what we feel is an organising framework for holding together our past and our present and it provides some anticipated shape to future life. It is an inner personal landscape.'[34]

Van Bueren identifies further dimensions:

> 'An identity transforms the biological entity into a legal being and confirms the existence of a specific legal personality capably of bearing rights and duties.'[35]

Freeman's description of identity is particularly apt in considering the importance of the right to identity for children born out of ICS arrangements. Many such children will not have access to this organising framework, given that they may have been created using genetic material from anonymous donors, may not know who their birth mother was, and may be culturally and geographically dislocated from their cultural origins and birth place, given the intention that they have been made in order to travel to and live in another part of the world.

Given these factors, ICS threatens to perpetuate the status quo in relation to the right to identity as "an interest long neglected and constantly denied".[36] However, the right to identity is a right too important to neglect in ICS situations; after all, "There can be few more basic rights than a right to one's identity."[37] The CRC was the first international human rights treaty to explicitly recognise the right to identity; although the right to identity enshrined in

33 Richard J. Blauwhoff, *Foundational Facts, Relative Truths: A Comparative Law Study on Children's Right to Know Their Genetic Origins*, 20 (2010).

34 M. Freeman, *The New Birth Right? Identity and the Child of the Reproduction Revolution*, 4 International Journal of Children's Rights 290 (1996).

35 Geraldine van Bueren, *The International Law on the Rights of the Child*, 117 (2006).

36 M. Freeman, *supra* note 34, at 274.

37 *Id.*at 283.

the CRC does not envisage the specific situation of artificially created children, it holds particular significance for that group of children,[38] and by extension to children born from ICS arrangements. Article 8(1) and 8(2) provide that:

> '(1) States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
> (2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.'

In the context of ICS, regarding the right to identity there are definite overlaps with issues discussed in previous sections. However here, three dimensions of the right to identity are arguably of heightened significance and deserve particular attention. Each of these is briefly considered below.

2.4.1 The importance of identity to knowing one's personal narrative

In ICS, unless specific steps are taken to ensure the child knows where they came from (including the identity of their genetic parents, as well as the identity of their birth mother), such children may be effectively left in an identity vacuum, lacking knowledge of their personal narrative. This could have a significant psychological impact on such children. In the context of adoption, discussion of a state of 'genetic bewilderment' has been a term applied to describe the effects of not being able to fully establish one's identity through a personal narrative.[39] This is equally applicable to the situation of children born from ICS arrangements; Sants states that

> 'a genealogically bewildered child is one who either has no knowledge of his natural parents or only uncertain knowledge of them. The ensuing state of confusion and uncertainty fundamentally undermines his security and this affects his mental health.'[40]

Leighton argues that children have a right to "the development of a sense of self as a lived narrative blending action and memory [and] to participate in their own histories and their own future."[41] Furthermore "children who have no identifiable origin, no identifiable human beginning to their personal

38 *Id.*
39 *See generally* H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37:2 British Journal of Medical Psychology, 133-141 (1964).
40 *Id.* at 133.
41 N. Leighton, *The Family: Whose Construct is it Anyway?*, in *The Family in the Age of Biotechnology*, 103 (Carole Ulanowsky ed., 1995).

narrative may have a sense of alienation in the world in which they find themselves."[42] Van Bueren also posits that

> 'the only method to preserve an identity is to have full knowledge of all the components of that identity, including that of the biological parents, and that unlawful interference includes not only actions which are unlawful in domestic law, but also actions which are unlawful in international law.'[43]

It is crucial that ICS children have knowledge of their genetic and cultural origins, in order to be able to piece together their identity which will have had its earliest beginnings in a cross-border context. Ryznar captures the crucial essence of what lies at the root of the issue, asserting that "Although such issues unavoidably arise in the adoption context, they are being intentionally created in international commercial surrogacy."[44] Therefore, it is crucial that intentional and proactive steps are taken by those involved in ICS – the commissioning parents, surrogacy clinics, medical professionals and national and state governments – to uphold the child's right to identity.

2.4.2 The importance of identity to knowing one's cultural and ethnic background

Knowing one's cultural and ethnic origins is another important aspect of identity. However, children born from ICS arrangements may not be provided with a sense of this, given that they are removed from the culture and ethnicity they are born in and with (apart from those situations where the commissioning parents are of the same ethnic or cultural background as the surrogate and/or genetic parents). The importance of knowing this aspect of one's identity has been identified as important in intercountry adoption; the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption explicitly requires that due consideration is given to the child's ethnic and cultural background for children who are adopted intercountry.[45] Unless the commissioning parents in ICS arrangements consciously ensure that the child knows their ethnic and cultural background and take active steps to ensure these links and knowledge are maintained, the child may end up ethnically and culturally dislocated and isolated. Therefore the importance of knowing this aspect of one's identity should be extended by analogy to the ICS context.

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42 *Id.*

43 Van Bueren, *supra* note 35, at 122.

44 Ryznar, *supra* note 1, at 1036.

45 Hague Convention of 29 May 1993 on Protection of Children and Co-operation In Respect of Intercountry Adoption, art. 16(c).

2.4.3 *The importance of identity to knowing one's genetic origins – the medical and health rationale*

Van Bueren asserts that

> 'Denying access to genetic records goes to the very heart of child-to-child equality, child autonomy and participation. Autonomy requires not only the skills to use knowledge but also, as a necessary precondition, access to the knowledge.'[46]

Indeed, this knowledge aspect of identity and knowing one's genetic origins is particularly important; as Blyth further notes, genetic origins are important especially given that

> '[…] we are aware anecdotally of concerns expressed by some parents who sought donor services in another country who are seeing in their growing children unanticipated physical characteristics, suggesting, at the very least, that the ethnic origins of their child's donor might not be what they originally thought. As these children grow up, whatever their parents initial intentions, it will be impossible to avoid talking to their children about their origins.'[47]

However, perhaps the strongest reason why it is important that children born from ICS arrangements have the opportunity to know their genetic origins is due to the importance of knowing this information for health reasons. Knowing one's personal health history – for example a heightened risk of developing a particular hereditary medical condition can be critically important. Again, in the context of intercountry adoption under the Hague Convention, the child's medical information is safeguarded, with contracting states obliged under Article 30(1) to preserve this for the child and under Article 30(2) to make this available to the child. The UN Committee on the Rights of the Child is yet to take a concrete position on the importance of knowing one's genetic origins as part of the right to identity in the context of donor assisted conception, but it has in some cases been critical of states that endorse donor anonymity (and as yet has not ventured into any consideration of ICS).[48] Unless commissioning parents and states play an active role in ensuring the child is privy to such information, the child may not have the opportunity to know their genetic origins. Given the cross-border location of their genetic origins, they may prove extremely difficult or impossible to trace, especially

46 Van Bueren, *supra* note 35, 121.

47 Eric Blyth, *Tackling Issues in Cross-Border Reproductive Care*, 2009, 508 BioNews, available at http://www.bionews.org.uk/page_38069.asp (last visited June 1, 2011).

48 Eric Blyth, *Donor anonymity and secrecy versus openness concerning the genetic origins of the offspring: international perspectives*, 2006, 2 Jewish Medical Ethics, available at http://www.medethics.org.il/articles/JME/JMEM10/JMEM.10.1.asp (last visited June 1, 2011).

in cases where anonymity has played a part, either in terms of donor(s) or the surrogate.

2.5 Potential for the selective creation of children – designer babies

Another way in which children may be left vulnerable given their creation through ICS is that their commissioning parents might select the characteristics of the child, essentially creating a 'designer baby'. Numerous motivations may underlie this, and various methods may be employed. For example, Shanley notes a common goal is to "create a family in which the children appeared to be the biological offspring of the husband and wife."[49] Sometimes, commissioning parents may want to ensure the child is a specific sex, and that it does not carry a genetic disease or disability. Pre-implantation genetic diagnosis (PIGD) allows this via analysis of embryonic cells. Utilisation of such screening methods may lead to sex-selective abortion or abortion on the grounds that the child carries a genetic disease or disability. Regarding the use of PIGD, Blyth notes its use "to exclude "undesirable" characteristics is criticized for legitimating sex discrimination, eugenic practices, and undermining the dignity of *existing* sick and disabled individuals as having a life that is "not worth living"."[50] Rao further asserts we are thus now in "the brave new world of neo eugenics".[51]

In his discussion of this issue Blyth highlights two further possibilities given rise through pre-selection of characteristics, which may be brought to fruition via ICS and therefore applied to the current discussion. Rarely, some commissioning parents may seek to create a child with a specific disability or physical condition. Blyth says that "Given the ostensible purpose of technology to avoid disabilities and adverse health conditions, its use deliberately to conceive a disabled child would strike many as perverse",[52] however goes on to note that "Nevertheless, recent research has shown that some clinics in the United States would be willing to "select in" a disability."[53] Clearly this raises a question in terms of whether such actions would be in a child's best interests; arguably in most cases, it would be difficult to see that the child's best interests would be served by such actions. Another possibility is a child who is conceived as a saviour sibling: a child whose tissue or cord blood could be used

49 Shanley, *supra* note 2, at 82.

50 Eric Blyth, *To Be or Not to Be? A Critical Appraisal of the Welfare of Children Conceived Through New Reproductive Technologies,* 16:4 International Journal of Children's Rights 510 (2008).

51 Mohan Rao, *The Brave New World of Neo Eugenics*, 94-110 *Making Babies: Birth Markets and Assisted Reproductive Technologies in India* 82 (Sandhya Srinivasan ed., 2010).

52 Blyth, *supra* note 50, at 510.

53 *Id.*

to treat a pre-existing sibling who is sick with a life-threatening illness,[54] as previously noted in part one of this article.

These situations of potential selective creation of children through ICS are problematic given the tension between the child's existence in and of itself, and the purpose for which it was created. Again, the question of what is in the best interests of the child, and how the reason for their existence would impact them later in life, arises. Here the relevance of Blyth's question as to whether bringing children into the world can ever be regarded as contrary to their interests comes into sharp focus.[55] Essentially, what these practices amount to is "instrumentalisation of children conceived with "made-to-order" characteristics or to perform a particular role, rather than for their own intrinsic worth".[56] These methods also veer into the territory of the commodification of the child, in this sense, for a specific purpose. The wider issue of commodification of children through ICS will be considered separately in this article, together with the issue of the commodification of women through ICS.

2.6 The impact of the creation of international surrogate children on potential adopted children

The rights of existing children awaiting adoption worldwide may be adversely affected by ICS, and more specifically, by the creation of children through ICS. Ryznar characterises the impact of ICS on adoption candidates as an "opportunity cost",[57] because by choosing the alternative of ICS over adoption, commissioning parents are displacing resources that may otherwise go towards adoption (thereby having a potentially negative effect on children awaiting adoption).[58] The motivation of commissioning parents to choose ICS over international adoption may be easily explained; as already discussed part one of this article, ICS offers the chance of a child with a genetic link to one or both of its commissioning parents, which many desire. As Pande notes, "The high demand for gestational surrogacy is precisely because the genetic tie remains a powerful and enduring basis of human attachment."[59] Moreover, the stringent regime of comprehensive checks and assessments to be undertaken in international adoption (under the Hague Convention on Protection of Children and Co-operation in Intercountry Adoption) – whilst all focussed on the best interests and welfare of the child – along with the time involved, may be perceived by prospective adoptive parents as presenting too many

54 *Id,* at 509.
55 *Id.* at 506.
56 *Id.* at 510.
57 Ryznar, *supra* note 1, at 1028.
58 *Id.* at 1037.
59 Amrita Pande, *It May Be Her Eggs But It's My Blood: Surrogates and Everyday Forms of Kinship in India*, 32 Qualitative Sociology 393 (2009).

hurdles, when ICS provides an alternative posing fewer barriers to having a child expeditiously. Although this may be a mistaken belief (as already noted, ICS brings with it a whole host of unique issues that are likely to be difficult to resolve), it does provide an alternative to adoption which is, at least superficially, in many aspects likely to be more attractive to many commissioning parents.

The current unregulated nature of the ICS market thus raises major questions as to who can access children via this new market. In stark contrast to intercountry adoption which is governed by a robust international regulatory framework (and indeed, one which has the protection of children at its heart), nothing of this kind exists to govern ICS, making children freely available to all people with the financial means to access the market. This makes children born from such arrangements potentially vulnerable to situations in which their welfare is not safeguarded, leaving them open to abuse and neglect in extreme cases, and as will be discussed shortly, to the risk of human trafficking.

3 WOMEN'S RIGHTS

As previously mentioned, to date, the majority of analysis of ICS remains centred on the position of the women who act as surrogates and their possible exploitation in the "brave new world of globalized motherhood".[60] This section provides an overview of some of the key human rights issues associated with women who act as surrogates in ICS, and highlights some of the key ways in which women's rights are potentially made vulnerable.

3.1 The potential for exploitation of the socio-economic position of poor women and for ICS to contribute to perpetuated marginalisation

Recent work of sociologists, journalists and filmmakers has revealed a picture of the situation of some of the women acting as surrogates in the burgeoning ICS market, especially in developing states.[61] Whilst the US continues to main-

60 Wendy Chavkin and Jane Maher (eds.), *The Globalization of Motherhood: Deconstructions and Reconstructions of Biology and Care*, 11 (2010). *See generally* for discussion of the potential for exploitation of women through ICS: Susan Markens, *Surrogate Motherhood and the Politics of Reproduction* 20-49 (2007); Pande, *supra* note 59; and Jyotsna Agnihotri Gupta and Annemiek Richters, *Embodied Subjects and Fragmented Objects: Women's Bodies, Assisted Reproduction Technologies and the Right to Self Determination,* 5 Bioethical Inquiry 240-241 (2008).

61 *See generally* for the most in-depth, up-to-date work in this vein Pande's body of work: *Commercial Surrogacy in India: Manufacturing a Perfect 'Mother-Worker'*, 34:4 *Signs*: Journal of Women in Culture and Society 969-992 (2010); *Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India*, 16:2 Indian Journal of Gender Studies 141-173 (2009); *'It may*

tain a strong foothold in the ICS market, the rapid growth in ICS is located in the developing world, in states such as India and Thailand. The supply-end of the ICS market is growing there through specialised medical clinics meeting the demand of prospective commissioning parents predominantly coming from the developed world, seeking cheaper surrogacy options.[62] These clinics recruit surrogates who are in most cases socio-economically marginalised, and are usually required to have already had at least one child and be within a specified age bracket.[63] Lee accurately observes therefore "the potential for exploiting poor women's reproductive functions as a form of cheap labour for economic profit is greatly heightened."[64]

That economically poor women are acting as surrogates in the developing world to meet the demand of developed world customers raises the question of whether these women are being exploited; indeed the fact that poor women are targeted to act as surrogate mothers seems to indicate that because of their poor financial situation or "economic desperation"[65] they will not only be more likely to take up work as a surrogate, but also be more likely to provide the child once born, to receive the monetary payment for the labour undertaken (and endured). Similar questions as to exploitation have been levelled in relation to the market for surrogacy services in the US, with a disproportionate representation of racial minorities acting in this capacity, seemingly reflecting the allure of the financial gain.[66] McEwen comments that "the barriers to exploiting poor women and women of color as gestational surrogates are few."[67] Moreover, in the ICS context, the fact that women are being offered sums of money incomparable to anything they would otherwise earn, makes acting as a surrogate highly attractive; whether this is exploitation is therefore questionable, given the power imbalance which has been established in the ICS market. As Goodwin says,

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be her eggs but it's my blood': Surrogates and Everyday Forms of Kinship in India, 32:4 Qualitative Sociology 379-405 (2009). A recent e-book has been published: *The Indian Surrogate: A Look Into India's Surrogacy Industry*, 2010, available at http://theindiansurrogate.com/ (last visited July 1, 2011). A recent film on ICS is Rebecca Haimowitz and Vaishali Sinha, *Made in India*, 2010, http://www.madeinindiamovie.com (last visited June 1, 2011); *see* for a review of *Made in India* Rachel Lyons, *Film Review: Made in India*, 2011, 599 *BioNews*, available at http://www.bionews.org.uk/page_89652.asp (last visited June 20, 2011).

62 *E.g.* the Hope Maternity Clinic in Gujarat, India, where Pande carried out her field work. *See* Pande, *supra* note 59, at 973ff.

63 *Id.* at 973.

64 Ruby Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 Hastings Women's Law Journal 281 (2009).

65 Pande, *supra* note 59, at 976.

66 Shanley, *supra* note 2, at 121.

67 Angie Goodwin McEwen, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 Vanderbilt Journal of Transnational Law 304 (1999).

> 'these women rent biological space to Americans and others urging them to export their reproductive process to other parts of the globe. These women are paid sums they otherwise would never see and are offered safe, clean housing and food. Most of them know – and even count on – never seeing the babies they will birth ever again.'[68]

The question of whether ICS is taking advantage of impoverished women has received some judicial attention in India. The Gujarat High Court highlighted the possibility of exploitation in the *Balaz* case, stating that "Exploitation of women through surrogacy was also a worrying factor".[69] When the case progressed to the Supreme Court of India, the Court is reported to have expressed concern for the situation of poverty-stricken women in India and emphasised the pressing need to create guidelines in order to protect surrogate mothers – in doing so it directed the Indian Surrogacy Law Centre to draw up such guidelines.[70]

Some advocates of ICS argue that it is a positive development for poor women, as it contributes to bringing them out of poverty.[71] While this may be the case in theory – or indeed even one of the aims of those who run surrogacy clinics in developing states – it remains the case that many of the surrogates will experience social stigmatisation in countries such as India in reaction to their work as a surrogate.[72] There, surrogates commonly move away from their home town and family for the year, often living in a surrogacy hostel or clinic, hiding in fear of the stigma attached to such activity;[73] at the worst level, they will be seen as dirty workers, akin to prostitutes, who are also viewed negatively in Indian society.[74] Moreover, it is questionable whether the surrogates actually receive all of the money they are promised

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68 Michele Bratcher Goodwin (ed.), *Baby Markets: Money and the New Politics of Creating Families*, at x (2010).

69 *Balaz v Anand Municipality*, High Court of Ahmedabad (11 November 2009) (India), at para. [10].

70 No official report of the Supreme Court judgment in the *Balaz* case is available, but *see* Bar&Bench News Network, *The Curious Case of Nikolas and Leonard Balaz*, available at http://barandbench.com/brief/2/401/the-curious-case-of-nikolas-and-leonard-balaz (last visited June 1, 2011). At the time of writing, no reference to the existence of such guidelines can be found, which indicates they have not come to fruition.

71 *E.g.* Dr Nayna Patel, who has been dubbed India's Mother of Surrogacy, *see India's Mother to Surrogacy*, in *The Indian Surrogate: A Look Into India's Surrogacy Industry*, *supra* note 61; in a television interview Dr Patel stated "How can you say that couple is exploiting the female when that female willingly wants to do it? You can call it exploitation when somebody is forcing, you cannot force surrogacy like any other organ transplant because it's a whole procedure of one year – almost nine months." *See* SBS Australia, *India's Baby Factory, Dateline Transcript*, available at http://www.sbs.com.au/dateline/story/transcript/id/600008/n/India-s-Baby-Factory (last visited June 1, 2011). .

72 Pande, *supra* note 59, at 975.

73 *Id.* at 981.

74 Pande, *Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India*, 16:2 Indian Journal of Gender Studies 156-160 (2009); and Pande, *supra* note 59, at 979.

or contracted to receive. In some cases, this money is said to end up going to surrogates' husbands, the surrogates themselves gaining very little benefit from their labour.[75]

3.2 The potential for the exploitation of women's bodies and reproductive rights and autonomy

A further concern regarding women's rights is that ICS exploits women's bodies and their reproductive rights and autonomy. Chavkin talks of the "disaggregation of motherhood",[76] whilst Goodwin describes ICS as "women leasing their wombs"[77] – therefore acting merely as incubators. It is necessary to ask whether women are doing this of their own volition, with an awareness of their own bodily integrity, or if they are under external pressure to become surrogates in ICS arrangements. The allure of the money offered to surrogates has been touched on above. However in India, another factor might influence surrogates' decisions to be party to an ICS arrangement. In some cases it has been said that surrogates are effectively pushed into this work through a combination of guilt (for example to make up for not being able to marry off one's daughter) and a belief that it is the right thing to do, as it is characterised as an altruistic action for the benefit of other human beings who are less fortunate.[78] In such cases the surrogate is therefore left in a relatively weak position with little bargaining power; Drabiak comments that

> 'payment for commercial surrogacy is defined as a deeply emotional transaction. […] However, unlike most other forms of employment, commercial surrogacy demands a consistent physical labor commitment, 24 hours a day for nine months, and – most importantly – results in the production of a human being.'[79]

Therefore reproductive autonomy may be precarious in ICS situations, and the surrogate's right to health, including sexual and reproductive health as a core component,[80] may be jeopardised. From a mental health perspective, undertaking the role of a surrogate may have immense psychological impact, especially given that the surrogate is expected to give up the child after birth.

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75 Pande, *Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India*, 16:2 Indian Journal of Gender Studies 157 (2009).

76 Chavkin, *supra* note 60, at 9.

77 Bratcher Goodwin, *supra* note 68, at x.

78 Pande, *supra* note 59, at 975-976.

79 K. Drabiak, C. Wegner, V. Fredland and P.R. Helft, *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, Journal of Law, 35:2 Medicine and Ethics 304 (Summer 2007).

80 Aart Hendriks, *The Close Connection Between Classical Rights and the Right to Health, With Special Reference to the Right to Sexual and Reproductive Health*, 18 Medicine and the Law 237 (1999).

As depicted in the opening scene of the trailer for *Google Baby*, this will not always be easy. There, a surrogate is seen giving birth. She is shown the baby, who is immediately removed to the commissioning parents. At this, the surrogate cries, and Dr Nayna Patel is heard asking "why are you crying?"[81] What this appears to illustrate is that Gupta and Richters' assertion that some surrogates "feel as though their body belongs to someone else"[82] may bear out in practice. Moreover, under arrangements governed by contracts, "the natural mother is irrevocably committed before she knows the strength of her bond with her child."[83]

Regarding physical aspects of the right to health and reproductive autonomy, ICS surrogates may not be made aware of the health risks they face by becoming a surrogate. As Gupta and Richters state, marginalisation may be perpetuated, and reproductive autonomy subordinated:

> 'Although offered as a choice, the decision to […] rent a uterus is seldom made on the basis of full information regarding health hazards, or in absolute freedom. It can be a considered decision, but the decision is generally made in a context of limited possibilities for self-expression or development, rising unemployment, lack of financial resources and in circumstances not always self-created.'[84]

Smith-Cavros also poses the question well:

> 'In countries where hunger and safe living conditions are dire problems for many, such as India, do women turn to surrogacy […] by choice and through the proper channels of informed consent, or out of desperation and lack of information and choices?'[85]

Therefore given the situations in which many ICS surrogates find themselves taking up their role, their right to health and reproductive autonomy may be jeopardised. The higher likelihood of multiple gestation births through ART often used in surrogacy, and the risks that go along with multiple births, may not be made clear to prospective surrogates in the developing world.[86] Therefore surrogates may be "facing increased chances of pregnancy associated health problems for themselves and their foetuses",[87] without knowledge of this situation.

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81 HBO, *Google Baby Trailer*, available at http://www.zippibrandfrank.com/ (last visited June 1, 2011).
82 Gupta et al., *supra* note 60, at 247.
83 Martha M. Ertman and Joan C. Williams (eds.), *Rethinking Commodification*, 64 (2005).
84 Gupta et al, *supra* note 60, at 247.
85 Eileen Smith-Cavros, *Fertility and Inequality Across Borders: Assisted Reproductive Technology and Globalization*, 4:7 Sociology Compass 470 (2010).
86 Chavkin, *supra* note 60, at 11.
87 *Id.*

4 Human rights issues common to both women and children in international surrogacy arrangements

The previous sections focussed on human rights issues raised by ICS pertaining to women and children as distinct groups. Additionally, there are some important human rights issues and challenges which cut across both groups. This highlights the fact that the rights of women who act as surrogates in ICS, and the rights of the children they give birth to, are to a certain extent intertwined; cognisance of this fact will assist in understanding the challenge of rights protection for both groups. This section discusses two of the most significant common issues.

4.1 Commodification of women and children

ICS arguably commodifies both women and children. Radin provides a helpful definition of commodification as "the social process by which something comes to be apprehended as a commodity, as well as to the state of affairs once the process has taken place."[88] Corea says when women act as surrogates their bodies form part of a "reproductive supermarket",[89] thereby reduced to commodities filling a demand in the market. However, surely whether or not women who act as surrogates should be understood as commodified depends to some degree on whether they undertake their work as a surrogate of their own volition, or if they are unduly pressured into acting as a surrogate. As discussed previously, in some cases of ICS, it seems apparent that surrogates are not undertaking their role fully of their own choice, but under external pressure or against their will. Despite this distinction, the fact remains that regardless of whether or not ICS surrogates act out of their own choice as surrogates, they do function as a commodity within a global market, integral to the entire transaction. This is because without the surrogate mother, it would not be possible for commissioning parents to have the child they commission.

The children born from such arrangements may also be viewed as commodities to be bought in the marketplace of ICS. Mahabal asks "Are babies commodities to be planted and harvested?",[90] whilst Michael Freeman notes the effect of surrogacy has been to commodify children, as the child "can be seen as the product of an expensive business transaction. Technically, the commissioning parents may be buying gestational services but they feel they are

88 Margaret Jane Radin, *Contested Commodities*, in Martha M. Ertman and Joan C. Williams (eds.), *Rethinking Commodification*, 64 (2005), at 81.

89 Gena Corea, *Surrogate Motherhood as a Public Policy Issue*, in *Reconstructing Babylon: Essays on Women and Technology,* 131 (P. Hynes (ed.), 1991).

90 Reported in Mark Magnier, *Room for Abuse in India Surrogacy,* April 30, 2011, The Seattle Times, available at http://seattletimes.nwsource.com/html/health/2014914731_indiasurrogate01.html (last visited June 1, 2011).

buying a baby."[91] Freeman rightly observes this wholly undermines any view of children as rights-bearing persons.[92] This may also have the spin-off effect of additionally undermining women's rights by rendering their role in ICS less visible.

4.2 The risk of human trafficking

Related to the concern that ICS commodifies women and children, is the heightened vulnerability of these groups to human trafficking caused by ICS; Corea describes surrogacy as "international traffic in women".[93] The fear is that women, especially in the developing world, may be trafficked for use as surrogates, whose babies will be harvested and sold. Recently this was shown not to be beyond imagination when a human trafficking and baby ring was found holding 14 Vietnamese women captive, seven of whom were pregnant, some said to have been raped.[94] Indeed, this case starkly shows the possibility of both women and children to be trafficked to exploit the demand for ICS.

The possibility of alleged commissioning parents commissioning children who are then trafficked also exists as a possible danger in the current unregulated ICS market. Non-governmental organisations in India raised this concern in the case of *Baby Manji Yamada vs. Union of India & ANR*.[95] More recently, a French family was found smuggling surrogate baby twins, born to a surrogate mother in Ukraine, into France. The babies were said to have been smuggled so the commissioning parents could register them as French citizens. The smuggling was, in the eyes of the commissioning parents, a means to ensure their surrogate children French citizenship given that surrogacy is illegal

91 M. Freeman, *supra* note 34, at 286.

92 *Id.* at 282. *See* for further discussion Hugh V. McLachlan and J. Kim Swales, *Show Me the Money: Making Markets in Forbidden Exchange: Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defence of Legally Enforceable Contracts*, 72 Law and Contemporary Problems 91 (2008).

93 Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*, 245 (1985).

94 *See* for reports of the Baby 101 human trafficking ring: ABC News, *Women Freed from 'inhuman' Baby Ring*, February 25, 2011, available at http://www.abc.net.au/news/stories/2011/02/25/3148396.htm (last visited June 1, 2011); and K. Macnamara, *Future Uncertain for Unborn Children in Thailand Baby Scam*, February 27, 2011, *Jakarta Globe*, available at http://www.thejakartaglobe.com/international/future-uncertain-for-unborn-children-in-thailand-baby-scam/425497 (last visited June 1, 2011).

95 Points, *supra* note 17, at 6.

in France.[96] These cases highlight the vulnerability of both children and women to be trafficked within the context of ICS, their human rights thus endangered due to the development of this global market.

This article has provided comprehensive coverage of the human rights challenges that ICS poses to the women who act as surrogates and the children who are born from such arrangements. Such a comprehensive identification and analysis of the human rights challenges arising out of ICS, collected together in one place, has not been undertaken to date. Arguably this forms a crucial foundation upon which recognition should now start to be given to ICS as a 21st century human rights challenge, requiring attention from the international community. In light of the human rights challenges and issues in this article, it can be said that for many of these issues, public international law tools and instruments – in particular human rights standards and norms – already exist, through which such challenges can and should be addressed. In order to protect the rights of those made vulnerable through ICS, the various parties involved in ICS arrangements, along with States Parties to relevant public international law treaties and other instruments, need to ensure that they act in ways which uphold and safeguard the rights of women and children in ICS, rather than jeopardise them. Indeed, this will often require the various competing rights and interests at play to be balanced against one another, in order to establish where rights protection is most needed in order to safeguard the groups made vulnerable in ICS. The crucial issue of rights balancing in ICS remains a rich and important area of research to which the author will focus on in the future.

96 Associated Press, *Family Held After Trying to Smuggle Babies Out of Ukraine,* March 24, 2011, The Guardian, available at http://www.guardian.co.uk/world/2011/mar/24/family-smuggle-surrogate-babies-ukraine (last visited July 1, 2011). In France, the decision of the Cour de Cassation in the case of the Mennessons (Arrêt n° 370 du 6 Avril 2011 (10-19.053), Cour de Cassation – Première Chambre Civile (France) demonstrates that it is not possible for ICS children to gain French citizenship.

4 Multiple 'Mothers', Many Requirements for Protection

Children's Rights and the Status of Mothers in the Context of International Commercial Surrogacy

Abstract

ICS always involves multiple potential parents, and this is a complicating factor for the child's enjoyment and exercise of their rights. This Chapter demonstrates this by focusing on one of the key relationships in ICS, between the child and their multiple 'mothers'. It contends that the notion of 'mother' is contested within the ICS context and cannot be understood straightforwardly because ICS involves more than one woman who may be genetically, legally, or socially understood as 'mother'. Examining this complex and tangled web of maternal relationships, this discussion traverses the various constructs of 'mother' in ICS and focusses on the central feature common to these mothers: to have, or to care for, a child. This Chapter discusses the child's rights in relation to those of his or her 'mothers', and the complexity of ICS mother-child relationships. The potential interests of each of the 'mothers' in ICS *vis-à-vis* the child are examined, and attention is given to how such rights and interests might be balanced with the rights of the child.

Main Findings

- Mother-child relationships are a central nexus in ICS arrangements.
- Mother-child relationships are complex in ICS because there are multiple women in any one ICS arrangement who may be understood to be the child's mother, linked to the genetic, biological and social aspects of 'mother'.
- As such, ICS challenges traditional notions of motherhood and this has implications for the rights of children born through ICS and the mother-child legal relationship.

Contextual notes

- This Chapter was written at a time when multidisciplinary scholars were beginning to come together to discuss the challenges raised by ICS. The main findings of this Chapter were initially presented to an international multidisciplinary workshop, *Deconstructing and Reconstructing "Mother": Regulating Motherhood in International and Comparative Perspective*, at Colum-

bia University in 2012 and provided the sole contribution from a child rights, international human rights law perspective.
- Jurisprudence which has emerged since the time this Chapter was written – and which is discussed later in this doctoral thesis – highlights that the surrogate mother-child relationship is still a contested site within ICS arrangements, continuing to present challenges from a rights balancing perspective amongst the core parties to ICS.

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1 Introduction

International commercial surrogacy (ICS) is inherently complex; a method of having a child largely made possible through a combination of technological advances, market-forces, and changing attitudes towards family structure and human reproduction. ICS raises a raft of profound, intersecting issues relating, among others, to bioethics, commodification of human life, globalisation and migration. ICS largely operates in an unregulated manner across international borders. People from disparate corners of the world are drawn together in a relationship that has its roots in the supply and demand of commercial human reproduction.[1] In this respect, ICS is different from other international commercial transactions given that a child is the intended outcome. Work is currently under way at the international level to assess whether an international regulatory framework for international surrogacy is viable.[2] Yet global consensus remains elusive given the range of State views and approaches to

1 It should be noted that not all international surrogacy is international commercial surrogacy. Some international surrogacy arrangements are altruistic in nature, characterised by the notion of a 'gift relationship' (see Liezl van Zyl and Ruth Walker, "Beyond Altruistic and Commercial Contract Motherhood: The Professional Model," Bioethics 27, no. 7 (2013): 374.) However, this chapter takes international commercial surrogacy as its focus and therefore, altruistic arrangements fall out of scope.

2 Permanent Bureau of the Hague Conference, Project on The Private International Law Issues Surrounding the Status of Children, Including Issues Arising From International Surrogacy Arrangements: http://www.hcch.net/index_en.php?act=text.display&tid=178 (last accessed 01 February 2014). This Project was preceded by work led by Professor Paul Beaumont and Dr Katarina Trimmings, School of Law, University of Aberdeen: http://www.abdn.ac.uk/law/research/international-surrogacy-arrangements-151.php (last accessed 01 February 2014). An output of the work of the University of Aberdeen was the following text: Katarina Trimmings and Paul Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, (Oxford: Hart Publishing, 2013). See for work by the author included as part of this collection, Achmad, C., 'New Zealand', at 295-310.

ICS, the lack of legislative and policy alignment, and in some instances, polarity of these positions.[3]

ICS functions with the express aim of producing a child. Such children are often much-wanted and longed-for by the people seeking them.[4] However, sometimes only minimal thought is given to how the eventual child's rights will be upheld and protected in an ICS arrangement. This is despite a core principle of the United Nations Convention on the Rights of the Child (CRC) that: "In all actions concerning children…the best interests of the child shall be a primary consideration."[5] This chapter proceeds from an international human rights law perspective: The centrality of the child to ICS, and the child's inherent vulnerability given his or her lack of personal autonomy and agency requires that his or her best interests be held paramount. But they must also be balanced with the rights of other persons involved. Therefore, to properly interpret the rights of the child in the ICS context, those of the multiple mothers involved require consideration.

Consequently, while this chapter takes the centrality of the child in ICS arrangements as its point of departure, it focuses on the complex and tangled web of 'mother' relationships that ICS entails,[6] examining the various interpretations of 'mother' that ICS arrangements may foster and their attendant implications for the rights of the child. This chapter highlights the enduring need to adhere to human rights law in ICS situations. Doing so allows for a balancing of the human rights and interests of mothers and children, to achieve rights protection where the mother-child nexus is rendered fragile and uncertain by the ICS context.

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3 E.g. some jurisdictions criminalise commercial surrogacy with extraterritorial effect (New South Wales, Australia is one example, see sections 8 and 11 of the New South Wales Surrogacy Act 2010), while others (such as India, Ukraine, Thailand) allow it to operate in a largely unregulated manner. For a discussion of the conflicts that discordant legal frameworks may produce, see Yasmine Ergas, "Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy." 27 Emory International Law Review (2013), 117-188.

4 Arguably, this will be the case in the majority of ICS cases. However, the possibility of persons commissioning children through ICS for purposes of child abuse, exploitation and/or trafficking cannot be ruled out. This has implications for the rights of the child given that they may be born into a situation whereby their rights under Articles 19, 34, 35, 36 and 37 of the United Nations Convention on the Rights of the Child (Nov. 20, 1989, 1577 U.N.T.S. 3) are breached. The preamble to the Convention recognises the inherent dignity of the child.

5 Article 3(1), Convention on the Rights of the Child.

6 N.B. this chapter focusses on mothers in ICS, not fathers. However, complications can certainly arise in relation to the roles of 'fathers' in ICS and it is possible to envisage ICS situations with multiple potential 'fathers'. E.g., such a situation may arise in ICS arrangements where two commissioning fathers are involved, or where a commissioning father does not provide his sperm for use in the arrangement and a sperm donor is involved, meaning there is a third-party genetic 'father'. This chapter does not delve into the question of whether men can be said to 'mother' in ICS arrangements. However, from an anthropological perspective this may well be a question ripe for consideration.

2 Understanding International Commercial Surrogacy as a distinguishable phenomenon

This chapter uses the term 'International Commercial Surrogacy' (ICS) in reference to surrogacy arrangements 'commissioned' by people[7] paying money to have a child through surrogacy in a State other than their own.[8] ICS is characterised by its cross-border and commercial nature.[9] While the practice of surrogacy grew from the mid-1970s and through the 1980s (predominantly in the United States),[10] ICS has emerged forcefully over the past decade. International surrogacy markets have developed and continue to grow, particularly in global South states such as Thailand and India,[11] with demand flowing predominantly from the global North.[12] The supply of ICS from global South states is dynamic in nature, gradually changing and adapting to demand and also in reaction to changing social attitudes and political pressures; notably, in early 2015 the Thai parliament passed a legislative ban on all commercial surrogacy services for non-Thai nationals (unless a person has been married to a Thai national for at least three years), with criminal penalties for commissioning parents and surrogate mothers who contravene the law.[13] But the supply of ICS services is not limited to the global South. To the contrary, global North states, such as, within the U.S., the state of California, attract a signi-

7 'Commissioning parents' may also be referred to as intending parents.

8 Commissioning parents who engage in international commercial surrogacy are motivated by various reasons. E.g. amongst other things, the inability to conceive a child themselves; desire to have a child with a genetic link to themselves; rejection of domestic or intercountry adoption or the failure to successfully adopt a child, for various reasons; inability to access surrogacy domestically; relative affordability of international surrogacy in certain States such as India and Thailand in comparison to States such as within the United States of America where commercial surrogacy is legal.

9 As distinct from compassionate or altruistic surrogacy, ICS involves a commercial element of some kind.

10 Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues – Expanded Edition*, (Cambridge: Harvard University Press, 1990), 5: 2-4. Field discusses two of the most well-known cases from this period in the US, *Stiver v Parker*, 975 F.2d 261 (6th cir. 1992), and *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

11 For discussion of the concept of a market for international surrogacy, see Debora L. Spar, *The Baby Business: How Money, Science and Politics Drive the Commerce of Conception*, (Boston: Harvard Business School Press, 2006), Chapter 3 "Renting Wombs for Money and Love: The Emerging Market for Surrogacy," 69-96.

12 However, commissioning parents from the global North do seek international surrogacy arrangements in countries such as Ukraine and the United States. E.g. see the cases *Re Application by BWS* [2011] NZLFR 621: commissioning parents residing in New Zealand commissioned twins in California; and *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam): commissioning parents in the UK commissioned a child in Ukraine.

13 BBC News, Thailand bans commercial surrogacy for foreigners, 20 February 2015, http://www.bbc.com/news/world-asia-31546717 (last accessed 20 May 2015).

ficant part of the market.[14] Northern states (such as California) can offer both legal certainty regarding legal parentage through the possibility of pre-birth orders, while global South states compete in part by providing ICS at lower cost and sometimes offering associated medical procedures – such as multiple embryo transfer to increase the likelihood of pregnancy, selective fetal reduction, mandatory caesarean deliveries – which are unavailable in global North states.[15]

Following the birth of a child through an ICS arrangement, the woman acting as the surrogate is expected to relinquish the child to the commissioning parents: the arrangement itself is premised on the fact that it is the commissioning parents (or commissioning mother(s) or father(s)) who intend to raise the child. Depending on the particular arrangement, the commissioning parents may or may not maintain contact with the surrogate. Moreover, she may act anonymously throughout all stages of the ICS arrangement.

In terms of the biological make-up of a child born through ICS, there are many possibilities. Within these possibilities, variants can exist, dependent on whether donors or surrogates act anonymously. The child may or may not be genetically related to one or both of the arrangements in which the surrogate has provided the ovum – thus establishing a genetic link between herself and the child – are termed "traditional surrogacy"[16] or "complete surrogacy."[17] But in "gestational surrogacy" – which has increasingly become the norm – embryos formed either by the commissioning parents' gametes or obtained from third parties are implanted in the surrogate, sometimes after being shipped across borders for use.

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14 Whilst comprehensive data on the incidence of international commercial surrogacy in the U.S. is not available, survey data of all fertility treatment provided in the U.S. (approximately 6000 cycles) is delivered to persons domiciled in countries other than the U.S., amounting to 4 per cent. See: Ethics Committee of the American Society for Reproductive Medicine, "Cross-border reproductive care: a committee opinion." Fertility and Sterility 100:3 (September 2013) 645-650 at 645. For an overview of commercial surrogacy laws in the various U.S. states, see Creative Family Connections 2015, Gestational Surrogacy Law Across the United States: State-by-State Interactive Map for Commercial Surrogacy, http://www.creativefamilyconnections.com/#!surrogacy-law-by-state/f49jq (last accessed 15 September 2015).

15 E.g. in some instances in ICS arrangements in global South states, procedures such as multiple embryo transfer and foetal reduction are offered.

16 Margaret Ryznar defines "traditional surrogacy" as a surrogacy which "results in a surrogate's genetic child following her artificial insemination with the intended father's sperm." See Margaret Ryznar, "International Commercial Surrogacy and Its Parties," John Marshall Law Review 43, no. 10 (2010): 1010. The "traditional" aspect can therefore be understood as drawn from the fact that the surrogate gives birth to her "own" child in the sense that it is genetically related to her, and not genetically related to the commissioning mother or to a third-party egg donor.

17 Mary Lyndon Shanley prefers this term to the use of "traditional surrogacy". See Mary Lyndon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption and Same-Sex and Unwed Parents*, (Boston: Beacon Press, 2001), 103.

Payments for ICS arrangements may flow in multiple directions. For example, fees may be paid to surrogacy clinics carrying out the associated medical procedures. Surrogacy brokers or third parties are often involved in arranging the surrogacy, usually commanding fees for doing so.[18] The surrogate herself may be paid for her services – either directly or through the clinic or other third party.[19] Contractual documents sometimes govern ICS arrangements, but not always.[20] The exact nature of each ICS arrangement differs in all these aspects, often making it difficult to map all the people, places and transactions involved.

3 The central feature of 'mother': child

International human rights law is largely about protection. It is relevant to ICS situations, given the inherent vulnerabilities of those involved in ICS arrangements, not least children. Crucially, international human rights law provides standards and norms setting out the rights and corresponding minimum protection measures to which all human beings and particular groups are entitled. To properly understand the rights of particular vulnerable groups, it is important to understand them holistically, in relation to the rights of those around them and in the context in which their rights may be at risk of being breached. This applies to understanding the situation and rights of the child in ICS arrangements. In particular, understanding the 'mother'-child relationship is crucial, given it is a central nexus within all ICS arrangements.

But in ICS the rights (and obligations) of 'motherhood' may apply to several women.[21] The defining and universal feature of 'mother' is 'child'. It is always the existence of a child who is cared for or in some way related to a woman that leads to her being understood as a 'mother' – both legally and socially. The Oxford English Dictionary defines 'mother' as "a woman in relation to

18 Permanent Bureau of the Hague Conference on Private International Law, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising From International Surrogacy Arrangements* (Prel. Doc. No 11, 2011), 19.

19 Surrogates are open to the risk of exploitation here, and women who act as surrogates may already be vulnerable given their pre-existing position of economic marginalisation. Payment of surrogates may be arbitrary and not always guaranteed. For discussion of the risk to surrogate mothers in India in relation to payment, see Centre for Social Research, *Surrogate Motherhood – Ethical or Commercial* (2013) 47-48. See also Amrite Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India,* (New York: Columbia University Press, 2014) 56; 71.

20 See for a comprehensive discussion of the various types of surrogacy arrangements, see the Indian Supreme Court's observations in Baby Manji Yamada Vs. Union of India & ANR [2008] INSC 1656 (29 September 2008), paras. [5]-[12].

21 It is worth noting, however, that 'mother' is a term which is arguably applicable to men. For example see Darren Rosenblum, "Unsex Mothering: Toward a New Culture of Parenting." Harvard Journal of Law and Gender vol 35 (2012): 57.

a child or children to whom she has given birth".[22] Traditional understandings of whom and what constitutes a 'mother' at law align with this definition, with many domestic jurisdictions propounding the position that the person who can be understood to be a legal mother is the woman who gives birth to a child, in accordance with the maxim 'mater semper certa est' or 'the mother is always certain'.[23] Adoption and parentage laws have broadened the notion of a legal mother or parent in some specific circumstances.

ICS challenges these traditional notions of motherhood in new ways, beyond those entailed by adoption and assisted reproductive technology. In an ICS arrangement, as many as three different women can be identified as 'mother' in relation to any particular child.[24] These are: the woman who acts as a surrogate; the woman who provides her ovum; and the woman who (either alone or with a partner) 'commissions' the child. Who is considered the (or 'a') mother, impacts not only that particular woman's rights but also those of the other women implicated in any specific ICS arrangement; due to the commercial and cross-border elements present in ICS, these situations stretch the limits of the meaning of 'mother' and who can be understood as being a 'mother' into new terrain. The potential implications of three different women being variously understood as 'mother' in an ICS arrangement can furthermore have implications for and impacts on the rights of any child who is born.

4 Multiple Mothers: The Many Faces of 'Mother' in International Commercial Surrogacy

4.1 Surrogate

As the woman who gives birth in ICS, the surrogate performs the role closest to the traditional notion of 'mother'. In many ICS 'demand' jurisdictions (that is, States in which commissioning mothers or parents originate from or reside

22 See Oxford Dictionary online, (Oxford: Oxford University Press, 2014), http://oxforddictionaries.com/definition/mother (last accessed 01 February 2014).

23 One such example is New Zealand's Status of Children Act 1969. Section 5 puts forward the presumption that it is the woman to whom a child is born who is the mother of the child. Section 17 governs motherhood in assisted reproduction situations, and posits that the woman who becomes pregnant is the mother even though the ovum is donated by another woman. Another example is found in the UK: section 33 of the Human Fertilisation and Embryology Act 2008 specifies that the mother of a child born through surrogacy is always the surrogate.

24 In fact, in situations where there are two commissioning 'mothers' (as will be the case where a same-sex couple commission a child through ICS), this may be expanded to four potential 'mothers' in relation to one child. For simplicity, in what is already a complex discussion, this situation is not considered in this chapter, which is confined to consideration of the possibility of three 'mothers' in ICS situations. In situations where there are no commissioning mothers (i.e. there are commissioning fathers), there will only be two potential mothers, and where the surrogate is also the genetic mother, only one mother will potentially exist.

in), under domestic legislation a woman who gives birth as a surrogate is held to be the legal mother of the child. This hinges on the very act of biologically carrying the child to term through supporting and nourishing the child's development with her own biological matter and giving birth to the child. However, in ICS situations, the surrogate's role in relation to the child is intended from the outset of an ICS arrangement to be time-limited to the gestation period and the birth. After the child's birth, she is expected to relinquish the child and any 'mother' role that she may have felt or held before the child's birth, given that it has ostensibly been agreed that the commissioning 'mother' will care for and raise the child as its 'mother' in an on-going, social sense. As numerous legal cases and anthropological studies have shown, however, in practice the surrogate may feel an enduring connection to the child at the emotional level, given her role carrying the child to term and giving birth to the child, acts which are immutable. This can give rise to many reactions – from private grief to legal challenges to the obligation to relinquish the child. While the surrogate may enter into an ICS arrangement with the intention of providing the child to the commissioning 'mother' following the child's birth, her intentions may change throughout the course of the ICS arrangement or once the child is born, and she may decide she wants to keep the child.

Where the law views the surrogate as the child's legal mother, this creates an obstacle in ICS in terms of the legal parent-child relationship. In such cases, the position of the surrogate as a legal 'mother' persists until the relationship between her and the child is severed at law, for example through the establishment of a legal parent-child relationship between the commissioning mother (or parents) and the child through adoption. This severance of the parent-child legal relationship is not always possible and is in no way guaranteed. Moreover, in many jurisdictions where a child is born through ICS, the surrogate is listed as 'mother' on the child's birth certificate. India constitutes an exception to this rule: current guidelines stipulate that birth certificates in the case of ICS children will be issued in the names of the genetic or commissioning parents, such that the surrogate does not have formal 'mother' status under Indian law. Thus in many ICS situations, the surrogate is physically, socially (in some respects, at the very early part of the child's life, from conception to birth) and legally viewed as the eventual child's mother. Yet she performs her 'mother' role having agreed to be left childless following birth and in the knowledge that the commissioning mother (or parents) is expecting to be provided with the child once he or she is born. As noted above, however, the intentions of a surrogate may change over the course of a pregnancy or once a child is born in an ICS arrangement (potentially leading to a dispute over the child with the commissioning 'mother'), the possibility of which can never be completely eliminated from such arrangements. Even in ICS arrangements governed by contracts in jurisdictions where such contracts are enforceable, situations may arise where the surrogate mother acts in a manner contravening

the agreement and it may be extremely difficult to enforce performance of the contract.

Surrogates have variously been described as 'outsourced' wombs, 'cheap or rentable womb[s]', 'human incubator[s]', 'gestational carrier[s]' and 'biological mother[s]'. Arguably, this wide range of terminology – which appears to studiously avoid references to a 'mother' role – highlights that the surrogate is open to marginalisation and exploitation in ICS arrangements, regardless of the reality that without her participation, the commissioning 'mother' would have difficulty in realising her wish to have a child. Pande observes the dual imperative under which surrogates in India are expected to carry out their role, counselled in fertility clinics and surrogacy hostels to simultaneously see themselves as 'workers' and not 'mothers' ('worker-producer'), and as 'mothers' and not 'workers' ('mother-reproducer'). Pande describes this training as "manufacturing the perfect motherworker'. She notes that the surrogate "is expected to be a disciplined contract worker who gives up the baby at the termination of the contract, [and] is simultaneously urged to be a nurturing mother for the baby, and a selfless mother who will not negotiate the payment received." Furthermore, an integral aspect of the conflict inherent in the surrogate's 'mother' role in ICS arrangements is neatly summarised in Pande's statement that "When one's identity as a mother is regulated and terminated by a contract, being a good mother often conflicts with being a good worker".

4.2 Genetic

A woman contributing her genetic material in ICS arrangements is in a similar position to the surrogate, given that to a certain extent, her role is time-limited. Through the discrete act of providing ovum, her role in the ICS arrangement is complete. However, her role differs from that of the surrogate as through this act of donation, she establishes an enduring genetic connection with the child. Although gestation – the act which is unique to the surrogate mother in ICS – entails a series of biological processes which have an enduring impact on the child, it is the genetic mother alone who has a genetic connection to the child who is born. But does this mean that the woman who provides genetic material in ICS should be understood as a 'mother' in relation to any eventual child who is born? Clearly, there is a strong argument to be made that she can properly be distinguished as the 'genetic mother', separate from the surrogate or the commissioning mother. A genetic relationship with a child cannot be severed at law or otherwise altered. Indeed, unlike the relationship between the child and the commissioning and surrogate 'mothers', the genetic 'mother's' relationship with the child is able to be scientifically proven through DNA testing. Yet such a genetic mother may not be recognised under law as being a 'legal mother' in ICS or other surrogacy situations, given that this role

is generally reserved for the birth mother and in some exceptions, the commissioning mother.

In ICS, the involvement of the genetic 'mother' with the child may go no further, remaining purely based in genetics. Drawing an analogy from the experience of domestic surrogacy involving genetic surrogate mothers, the willingness of the commissioning parents to have the genetic 'mother' involved in the child's life is the likeliest factor immediately determining the extent of any social relationship with the child. In arrangements where the genetic 'mother' acts anonymously, this most likely will remain impossible.

In some instances of ICS, the genetic 'mother' may be blended with the surrogate 'mother' or the commissioning 'mother'. In practice this means that the surrogate can also be the genetic 'mother', therefore bringing a child who is genetically hers (through donation of her ovum) to term. In some ICS arrangements, the genetic 'mother' will be the commissioning 'mother', if she is able to contribute ovum. For example, this can occur in situations where the commissioning 'mother' cannot carry a child to term due to a hostile uterine environment but is fertile and can provide gametes, or where a commissioning 'mother' does not wish to or is unable to carry a child to term for other reasons but can provide gametes.

Lastly in relation to the genetic mother, it is important to note that often she will be referred to as the 'egg donor'. The effect of this is to remove any reference to this woman as being a mother in relation to the child, reducing her role to a purely transactional one, giving no recognition to the enduring nature of her connection to a child born through IC as a result of the provision of her genetic material.

4.3 Commissioning

Although it is the genetic and surrogate 'mothers' who physically enable a child to be born through ICS, most ICS arrangements begin with the desire of the commissioning 'mother' (or the commissioning parents or the commissioning father) to have a child. Nevertheless, it is this woman whose role as 'mother' is the most challenging construction within ICS. The commissioning 'mother' is the person (or one of the persons) who drives the whole ICS arrangement – it is her desire to have a child that brings into play the involvement of the two other potential ICS 'mothers', by virtue of the fact that she is unable to conceive or carry a child herself or chooses not to.

However, in many ICS arrangements she is not the 'mother' with a genetic connection to the child, and in all ICS arrangements she is not the woman who gives birth. Therefore, in ICS the woman who seeks to 'mother' the child in a social and on-going sense is the 'mother' with the most problematic link to the child and to the legal parental status of 'mother'. This is particularly so given traditional legal paradigms and emphasis placed on the biological

nexus between mother and child through the act of gestation and birth. The 'mother' role that the commissioning mother seeks to fulfil is wholly socially constructed, rather than established though a genetic or biological link (as is true in the case of the child's genetic 'mother' and surrogate 'mother' respectively). As previously noted, often the law does not recognise her as a mother at all. In jurisdictions where this is the case, to become the child's legal mother, the commissioning 'mother' has no other option than to apply to adopt the child or seek legal parentage of the child. This woman's status as 'mother' in ICS situations is, at its crudest, borne of a transaction. However, to reduce her 'mother' role to such a restricted reading ignores the most basic fact, that it is often due to her deep desire to have a child to care for and to mother, that the child has come into being. Her role as 'mother' to the child, if she goes on to care for the child, is that of a mother in the social sense. The question is when – and how – across the many jurisdictions that may come into play in ICS, this desire can be coupled with her legal recognition as a 'mother.' In ICS cases where the commissioning 'mother' is also the genetic 'mother', it is arguable that her status as 'mother' is bolstered, given her enduring link to the child in terms of DNA. However, in practice the features most importantly distinguishing the commissioning 'mother' from the other two potential 'mothers' is that without her there would be no child. Whilst all the 'mother's involved in ICS are indispensable to the success of any individual arrangement in producing a child, it is the commissioning 'mother' who initiates the process and from the outset of the ICS arrangement, she is the only 'mother' intending to care for and raise the child as her own.

Despite the surrogate mother's contractual obligation to transfer the child to the commissioning 'mother' upon or shortly after birth, the commissioning 'mother' remains highly vulnerable: contracts governing ICS arrangements are often difficult to enforce and as previously noted, the intentions and decisions of the surrogate may change over the course of her pregnancy or following the birth of the child. Requiring specific performance of such contracts would be contrary to the child's rights as established under international human rights law, given that specific performance would explicitly render children the product of such contracts and in doing so, commodify them. Requiring specific performance of such contracts would also be contrary to the rights of the surrogate 'mother', given that she may well have a valid claim to a legal mother-child relationship regarding the child she has brought to term and given birth to. To require specific performance of such contracts would therefore ignore the reality of the surrogate 'mother's' role in ICS arrangements. Moreover, within limits, the commissioning mother's rights may also be impacted through a lack of clarity over her legal status as a 'mother' in relation to the child.

Therefore, although the commissioning 'mother' is the 'mother' (in contrast with the surrogate and the genetic 'mother') who likely intends to care for and raise the child as her own at all points throughout the course of an ICS

arrangement (unless, of course, she changes her mind), she is the 'mother' with the most difficulties in establishing a 'mother' relationship in ICS.

5 Absence of 'mother' in International Commercial Surrogacy

Despite the fact that multiple women may be able to stake a claim to being their 'mothers', children born of ICS arrangements may also be left 'motherless.' An absence of 'mother' can occur due to human and legal factors, as discussed below.

5.1 Human

The first situation where the absence of a mother to care for and raise the child is possible is when the commissioning 'mother' decides, either before or once the surrogate gives birth that she does not want to perform this role. Such a decision by the commissioning mother (or parents) not only undermines the entire ICS arrangement, but it leaves the child in a position of heightened vulnerability. This possible outcome can never be completely ruled out in ICS, given that at their root, such arrangements are based on a good faith understanding that all parties will follow through on the actions they commit to in respect of one another. In situations where the commissioning mother rejects the child, the surrogate 'mother' or the genetic 'mother' might be willing to be a 'mother' to the child on an on-going basis. But in situations where none of the three 'mothers' want to be a 'mother' to the child in an on-going manner, and if the partner of the commissioning mother (in instances where she has a partner who is legally recognizable as a parent) also reneges on the ICS arrangement, it may well fall to the State to assume a care and protection role in relation to the child, if the State is unsuccessful in attempts to enforce maternal obligations where commissioning 'mothers' have been deemed legal mothers. In such situations, the State will arguably be obliged to do so under the Convention on the Rights of the Child.

This further raises complex questions around which State should or is best positioned to take responsibility of the child when ICS arrangements go awry in this way. Arguably in situations where demand flows from commissioning parents in the global North to have a child through a surrogate in the global South, international development burden-sharing theory can be applied by analogy. On such a basis, the State the commissioning 'mother' (or parent(s)) originates from or resides in should provide care and protection to the child, rather than leaving the State where the child is born with this burden. However, the converse argument can be made in situations where the home State of the commissioning mother or parents does not sanction ICS but the country in which the surrogacy and birth takes place does allow ICS. In such situations,

arguably it is the State that has opened itself to the risk of the burden of ICS children who end up motherless (or parentless) that should be the State to take responsibility for the child.

5.2 Legal

The second factor that may lead to a child born through ICS being 'motherless' or without parents who are committed to caring for and raising him or her is the law itself. Such a situation can be triggered when national legislation and policy either does not make provision for ICS or actively prohibits it. The inadequacies of national frameworks, the conflicts among them, and the absence of international regulation interact, undermining the certainty that children born through ICS will have a legally recognized 'mother' (or parent(s)). Where legally recognized parentage cannot be established, the child may also not have access to other entitlements, which can impact negatively on the child's rights.

In practice, such situations occur when neither commissioning 'mother' nor commissioning 'father' can demonstrate a connection to the child meeting particular state requirements for creating a legal parent-child relationship (or gaining entry to their home State to begin such a process). This can happen in instances where the state of origin of the commissioning mother – or parent generally – requires proof of a specific kind of connection (for example, genetic) in order to recognize parentage and, hence, citizenship.

Ireland provides an example of this. Under the Irish Guidelines a child will not be considered for a travel document or citizenship by the Irish government unless DNA evidence of a genetic link to the commissioning 'father' is provided, from a "suitably qualified independent third party." Such a requirement raises severe implications in ICS arrangements where donor sperm has been used and no genetic link between the commissioning father and the child exists, or in instances where there is no commissioning father, but only a commissioning mother or mothers. In such situations, the position of the child and protection of their rights will remain highly uncertain. Whether the child's status is regularised by State exercise of exception-based discretionary decision-making must surely be viewed as a remote possibility. State level guidance has been established in the United Kingdom, requiring a genetic link to at least one of the commissioning parents for entry of the child into the UK. Proof must be gained via DNA testing through an accredited company. This is a slightly less restrictive approach to that of Ireland, given the wider scope of the proof of a connection to the child from a commissioning mother or father.

In some other jurisdictions where such formal guidelines and requirements do not exist, courts appear to be taking into consideration evidence that proves some sort of link – usually genetic – between the commissioning 'mother' and/or 'father' before exercising discretionary powers to establish a legal parent-

child relationship. But where courts cannot establish such a link and governmental regulations prohibit establishing a legal relationship between the commissioning 'mother' and the child, the commissioning 'mother' is prevented from caring for the child in her home State. In such situations, the commissioning 'mother' still wants to mother the child. However, where neither surrogate nor genetic 'mother' want to 'mother' the child in lieu of the commissioning mother, and if the commissioning mother cannot stay in the State where the child is born, the child may be abandoned in the country of his or her birth, without a 'mother' (or other parent). Essentially, the child is left without a legally recognised parent, despite being brought into the world as a result of very specific and directed actions by a person who went to great lengths to have a child and others who have participated in enabling this to happen. Again, this undermines the child's rights to citizenship and nationality as well as to preserve their identity and to grow up in a family environment. Parentlessness under law often correlates with statelessness, leaving children at risk of being brought up in institutions that may afford few protections of their human rights.

6 The Contestable Notion of 'Mother' in International Commercial Surrogacy and Implications for the Rights of the Child

The timeline of ICS arrangements leads to the three different women discussed in this chapter being involved in the arrangement at different points in time and for different lengths of time. The very fact that the genetic mother's gametes contribute to the genetic make-up of a child born through ICS means that her link with the child can neither be changed nor displaced; it is inherently un-severable. The link between her and the child is a significant one. However, unless the genetic mother also acts as the surrogate, in ICS she will rarely be recognised as the child's legal mother, at any point in the ICS timeline. This can have implications for the child's rights to identity and health, in particular if she acts anonymously and the child therefore does not know even so much as her name. Despite the position that the law may take, the genetic mother's link does not 'stop' at any point in time. It is arguably in both the child's and the genetic mother's best interests that there is at least social recognition of the mother role played by the genetic mother in relation to the child. India's *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India* appear to acknowledge this to some extent, providing for information about donors (including their identity) to be released by ART clinics only "after appropriate identification, only to the offspring and only if asked by him/her after he/she reaches the age of 18 years, or as and when specified for legal purposes, and never to the parents (excepting [sic] when directed by a court of law)."

Contrary to the genetic mother, if acting purely as a surrogate in an ICS arrangement, the surrogate mother does not have any on-going relationship with the child unless that is agreed to with the commissioning parents, or if the child seeks out their surrogate mother later in life and the relevant information is made available. Again this will be extremely difficult if the surrogate acts anonymously. In most instances of ICS, it seems likely that the surrogate's role in the child's life will be time-limited to the period of pregnancy and birth, with the surrogate not playing any role in the sense of a social mother. This is unfortunate and should be guarded against, given that an on-going role in the child's life, or at the very least knowledge of the surrogate mother can aid in realisation of the child's rights to identity, nationality and health. The legal position of the surrogate may well be to the contrary, however, given the position that in many jurisdictions the surrogate mother is recognised as the legal mother the child, a position which often can only be displaced through legal extinguishment of the parent-child relationship of the surrogate and the child through the establishment of a new legal parent-child relationship via the granting of an adoption order.

In practice, it is possible in ICS situations for the commissioning mother to assume the social 'mother' role as soon as the surrogate relinquishes the child, despite her not having any guarantee that she will eventually be recognised as the child's legal mother. A gulf between fact and law may therefore persist for quite some time, until a legal relationship is established. If the parent-child relationship between surrogate mother and child is extinguished through law, any reinstatement of the surrogate's 'mother' role in relation to the child will be dependent on whether the commissioning mother or parents involve the surrogate in the child's life in any on-going capacity. Again, as discussed above in relation to the genetic mother, from a human rights perspective, arguably the surrogate should continue to be construed as a 'mother' to some extent in relation to the child, given the fact that she brought to term and gave birth to the child. These are factual acts which cannot easily be displaced, other than through a social re-construction of the circumstances of a child's gestation and birth. That the surrogate 'mother' unlikely has any ongoing relationship with a child born through ICS following their birth may well have implications for the surrogate as well as the child. The surrogate may be impacted from a mental or physical health perspective (or a combination of both) without any on-going role or recognition of the role she played in bringing the child into the world. From a child rights perspective, the child may be impacted negatively if the surrogate plays no on-going role or if there is no opportunity for the child to have any knowledge of their surrogate mother and her role, given that the child may wish to know her identity later in life, in particular to realise his or her own rights to identity and to health.

Of course, the converse argument can be put forward, that knowledge of the surrogate mother may cause a child born through ICS confusion and

bewilderment in relation to their identity. Steps should be able to be taken to ameliorate such an outcome, through providing the child with appropriate support in their understanding the circumstances of their birth. Equally, the surrogate may not wish to have on-going contact or involvement with the child, who she may purely view as the child of the commissioning mother (or parents).

As with the question of when – as well as whether – the genetic and surrogate mothers in ICS 'stop' being 'mothers' to the children they play an integral role in creating, it is necessary to consider when a commissioning 'mother' starts being a mother. This is despite the fact that she is the one woman of the three possible mothers in an ICS situation who at all points through an ICS arrangement (unless she changes her mind) wants to permanently and enduringly be the mother to the child who is born, and be recognised as such, both legally and socially. In practice, she is the woman whom it is most difficult to construe as mother to the child, given that in most ICS arrangements she is not genetically related to the child and the law will not automatically recognise her as the child's mother. Therefore, the question of when a commissioning mother becomes a mother in ICS situations requires consideration from both a social and a legal perspective.

Unlike the genetic and surrogate 'mothers', the commissioning mother's status in relation to the child is entirely socially constructed, until a point in time where she is able to establish a legal parental relationship with the child. Her relationship to the child is arguably based on four factors which may be present prior to the establishment of any legal status: her desire to have the child and intention to care for and raise the child as her own; the payment of money in relation to the ICS arrangement; that she may be party to either a written or oral agreement about the arrangement; and that she is likely to assume responsibility for caring for the child as his or her 'mother' once the surrogate mother relinquishes the child.

Arguably, the commissioning 'mother' becomes a mother to the child in a meaningful social sense from the point in time when she assumes care for the child, following his or her birth. It is from that point that the surrogate's substantive involvement with the child is usually expected to end and the child and commissioning mother can begin to form an attachment in the form of a mother-child relationship. However, the surrogate 'mother' may want to maintain a connection to the child, and in some ICS arrangements there will be a period of substantive overlap regarding involvement and attachment of the child and his or her surrogate 'mother' and his or her commissioning 'mother'. For example, this may occur if, at the request of a commissioning 'mother', a surrogate 'mother' agrees to breastfeed the child during his or her first few days or weeks of life. From the perspective of commissioning 'mothers', it is understandable however, that many view themselves as the child's mother from the child's conception onwards, given the child carried by the surrogate is intended for the commissioning 'mother' (or parents). This

view likely holds even if the commissioning mother is not genetically related to the child and lives in a different State to that where the surrogate is located. Surrogates themselves may or may not view the commissioning 'mother' as the mother of the child in ICS arrangements. Again, this is understandable given the complexities of the practical and emotional aspects of carrying a child for another person – a child who may or may not be genetically related to the surrogate herself. Therefore, identifying when a commissioning 'mother' becomes a mother from a social mothering perspective in ICS arrangements is a blurry exercise. In reality, in addition to what relevant laws and regulations prescribe, it will be largely dependent on the different personal attitudes and individual circumstances involved in specific ICS arrangements; navigation of who is 'mother' and when may prove complicated and fraught.

While some States such as Ukraine and California maintain a competitive edge in the ICS market through securing the recognition of the commissioning 'mother' as the legal mother of a child born through ICS, in some States supplying ICS, it can take a substantial period of time for a commissioning 'mother' (or commissioning parents) to attain legal 'mother' status in relation to a child born through an ICS arrangement – indeed, if she is able to at all. This will lead to great uncertainty in status for both the child and the commissioning mother. The child's rights to nationality, identity and to grow up in a family environment under the Convention on the Rights of the Child may again be undermined as a result. In some jurisdictions, gaining legal status as mother to a child commissioning through ICS may simply not be possible under the relevant domestic legislation, with discretionary measures such as adoption orders providing the only method by which a legal parent-child relationship can be established. Given this reality, the child may be in a vulnerable situation regarding his or her right to grow up in a family environment and potentially rendered stateless, impacting on their wider rights.

In States such as Australia, New Zealand and the United Kingdom, judges are grappling with the fact that while domestic legislation construes the birth mother of a child to be the child's legal mother and furthermore, prohibits commercial surrogacy domestically, albeit without extraterritorial effect, they are faced with applications from commissioning 'mothers' for parentage or adoption orders in respect to the children that have been born through the ICS arrangements they have entered into. But, as Justice Hedley of the UK High Court insightfully remarked, the "difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order." Chief Judge Pascoe of the Federal Circuit Court of Australia has described this as the "fait accompli upon return" in international surrogacy cases coming before Australian Family Law Courts. And while for many judges the "fait accompli" of the child's existence combines with the obligation to adopt their best interests as the primary consideration in any judicial proceeding leads them to grant

the orders that the commissioning parents have requested, at least in theory there is no guarantee that this will be the case. Unless ICS is recognized by law and acknowledged in birth certificates that the commissioning mother's state of origin is willing to accept, she will be compelled to overcome the hurdle of establishing her legal status in relation to the child to gain full recognition as the child's mother.

7 Conclusion

Establishing the status of the various potential 'mothers' involved in ICS is both socially and legally complex. Not only is this problematic for the various ICS 'mothers', but as demonstrated throughout, the ramifications for the realisation of the rights of the child born through ICS can be wide-ranging, generating long-term negative impacts. The common denominator in all ICS arrangements is what the arrangement is driven towards providing: a child. In the absence of international agreements capable of regulating the attribution of 'motherhood' and the rules of parentage generally, children born through ICS are, and will continue to be, in a position of heightened vulnerability. As Michael Freeman has said, "There can be no doubt that children are amongst the most vulnerable and powerless members of our society today." The risk is that the current uncertainty surrounding the attribution of motherhood exacerbates such vulnerability.

The speed with which the technological and medical advances making ICS possible have progressed has outstripped the development of the law to regulate and provide protection to parties made vulnerable in these arrangements. The need for national legislators and policy-makers to engage with developing responses to ICS focussing on ensuring human rights protection is necessary, and it is crucial that the international community remains engaged in continuing to consider options for possible international collaboration and regulation. A focus on the rights of the child in ICS in relation to the position of the child's potential 'mothers' is particularly important given the absence of any international regulatory framework governing the market or operation of ICS. The child has rights in relation to their 'mothers' and their 'mothers' have rights and interests in relation to the child. However, as this chapter has demonstrated, distinctions exist in ICS between notions of genetic, social and legal 'mothers', and these impact the rights of the child and the 'mothers' own situations. The child is the ultimate factor leading to a woman being understood as a mother, and while all the 'mothers' involved in ICS have human rights which may be open to breach through ICS and must be protected and upheld, the rights of children born through ICS require protecting alongside and balanced in relation to the situations of their multiple 'mothers'.

5 International Commercial Surrogacy and Children's Rights

Babies, Borders, Responsibilities and Rights

Abstract

This Chapter argues that the child is the locus of vulnerability in ICS. It is complementary to the earlier chapters of this study as it also presents discussion of the ethics and economics of ICS in relation to children, as well as assessing jurisprudential trends and non-judicial responses to ICS in selected ICS demand states, in light of the child rights framework under public international human rights law. This analysis shows that more can be done at the government legislative and policy levels to protect the rights of children conceived and born through ICS. It also argues that the framework of standards and norms for protecting the child's rights and best interests established by the CRC should be further utilised in jurisprudential decision-making, too. This will help to ensure that the child's rights and best interests are placed at the heart of ICS practice. This Chapter therefore advances the idea of the CRC not only setting standards and obligations for states and other key actors in ICS, but also as a useful and necessary tool for use in the ICS context, to uphold the child's rights and best interests in ICS.

Main Findings

- The ethical and economic challenges raised through the practice of ICS trigger risks to the rights of children conceived and born through ICS; the child's rights and interests can also clash with those of his or her potential parents.
- Children should be understood as the central locus of vulnerability in ICS arrangements. Their rights to identity preservation, nationality, family environment, health, education and social security can be particularly at risk.
- In the absence of dedicated legislation concerning ICS, Australia, New Zealand and the United Kingdom are using quasi-policy responses to guide actions in relation to individual ICS cases; these reflect child rights standards and norms to differing degrees.
- At the time of writing, Courts across the three jurisdictions were new to dealing with ICS cases; analysis indicates that the Courts' have only limitedly harnessed the CRC and other mechanisms to uphold children's rights in ICS judicial decision-making and judgments.

Contextual notes

- This Chapter was written at a time when State responses to ICS were initially developing and ICS jurisprudence was beginning to develop, despite a lack of international consensus concerning ICS.
- The Chapter was initially presented at the New Zealand Law Society Continuing Legal Education International Adoption and Surrogacy Conference, the first Conference of its kind in New Zealand.
- At the time of writing, the examples provided from three English-speaking, common law jurisdictions grappling with ICS as emerging demand-States provided a useful snapshot of state practice and judicial decision-making, and the extent to which these reflected CRC standards and norms. Since the time of writing, ICS demand continues in these jurisdictions; quasi-policy guidance is still used, and judicial decision-making in ICS cases reflects a growing trend of judges considering children's rights and best interests. N.B. Starting in 2018, the UK Law Commission will embark on a three-year surrogacy law reform project.
- Since this Chapter was written, some of the most significant ICS supply-side states have closed down ICS (e.g. India and Thailand); others have developed and have closed down ICS (e.g. Nepal); and others have developed but are taking steps towards limiting ICS (e.g. Cambodia). No definitive statistical data on the global prevalence of ICS exists.
- Although an absence of international consensus regarding ICS persists, since the time this Chapter was written, a number of international bodies are now actively exploring avenues towards greater consensus, through private international law and public international law frameworks.

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1 Introduction

Over the past decade, international commercial surrogacy (ICS) has established itself as a new method by which to have a child. Families are being built in new ways leveraging off globalisation, technological advances in medical science and communications, and the lower costs of artificial reproductive technologies and surrogacy offered through burgeoning supply markets in the Global South. Across a multidisciplinary spectrum, much attention has been given to the phenomenon of ICS from the perspective of the "commissioning" or "intending" parents, and the woman who acts as a surrogate. However, the child is the person at the centre of ICS arrangements and is the person inherently lacking agency, consequently in a position of heightened vulnerabil-

ity. Yet relatively little consideration – including by way of legal analysis through the rubric of international human rights law – has to date focused squarely on the rights of the child.

This paper, intended as a working paper to be elaborated on and detailed further through a presentation at the NZLS CLE International Adoption and Surrogacy Conference, seeks to focus in on the situation of the child in ICS, with reference to international law human rights standards and norms. It encourages understanding the child as a core locus of vulnerability in ICS. This is done through an exploration of the framework of the rights of the child in ICS, as well as consideration of perspectives on the ethics and economics of ICS in relation to children. Jurisprudential trends and non-judicial responses to ICS in three ICS 'demand' states are examined (Australia, New Zealand and the United Kingdom), in light of the rights framework and the ethical and economic context. Overall, this paper explores the specific vulnerabilities of children born through ICS, highlighting avenues for increased protection through international human rights law.

2 Conception cross-border

Discussion of the rights of the child in ICS necessitates being placed in the overarching context of the growth of conception cross-border. The expansion of ICS over recent years can be viewed as part of a trend of increasing numbers of people traveling cross-border internationally, predominantly from the more developed to the lesser developed world, to access a range of medical treatment and health services, often motivated by wider availability of services and competitive pricing in comparison to that offered in a home-State (Ramirez de Arellano, 2007). Ramskold and Posner note that reproductive tourism has:

> 'alongside other forms of medical tourism, grown in scale and numbers as globalisation has gradually erased many economic and cultural borders. Transitional capital economies in Southeast Asia, technological advances and free trade pave the way for the interest of the comparably affluent, yet ever more infertile, Western couples. […] In the last decade, reproductive tourism has, alongside escalating demand, become a multimillion industry, stimulating national economies and providing jobs in both the service sector and healthcare.' (Ramskold and Posner, 2013: 397)

Human reproductive tourism, therefore, is placed in the wider context of the growth of medical tourism, yet ultimately leads to something quite different in comparison to a more standard medical procedure such as a hip replacement or dental surgery. Ultimately, it leads to a child. In the area of human reproduction, never has it been easier for gametes (egg or sperm cells) to be purchased and shipped internationally, and to access the "services" of a surrogate and medical clinicians to oversee a surrogacy arrangement. Usually, such an

arrangement will include an exchange of money – thus bringing the commercial element into international surrogacy.

India and Thailand have emerged as the two most popular destinations to access or undertake ICS, and in this respect they are "supply" states. Mexico is tipped as the next emerging international surrogacy supply state (Global IVF, 07 January 2014, online), and Georgia and Ukraine are both popular among European commissioning parents. The boom in the growth of international commercial surrogacy is most clearly demonstrated in India, where it is estimated that 25,000 children have now been born through surrogacy (Shetty, 2012: 1633). However, in both India and Thailand, the surrogacy market has been left to operate in a largely unregulated manner. In India, since the legalisation of commercial surrogacy in 2002, the surrogacy "industry" is increasingly seen as a component in the growth of the State's role internationally as a hub for medical tourism, which has expanded over recent years (Lal, 2010: Asia Sentinel, online). Henaghan observes that:

> 'In recent years, the Indian Government's efforts to promote India as a cost-effective, quality medical tourism destination, as well as the abundance of women willing to be surrogates for a lower price (compared to the United States) has meant that increasing numbers of couples have travelled from Western countries to India to commission their children.' (Henaghan, 2013: 3).

Arguably the key driver of the growth of the industry has been lower costs than in Western countries and the availability of surrogates as Henaghan notes. Mukherjee elaborates that:

> 'So far [as the] the Indian perspective is concerned […] Indian surrogates have been increasingly popular with fertile couples in industrialized nations due to the relatively low cost. At the same time, Indian clinics are becoming more competitive, not only in the matter of pricing, but also in the hiring and retention of Indian females as surrogates.' (Mukherjee, 2011: 1)

Estimates of the value of the Indian surrogacy industry differ, with the Confederation of Indian Industry reportedly claiming the surrogacy industry to be worth $2.3 billion USD annually (Shetty, 2012: 1633), whilst other groups endorse claims of a more modest figure of $450 million USD annually (Center for Social Research, 2013: 23). Malhotra and Malhotra state that over 200,000 clinics are estimated to be operating in India, offering IVF, artificial insemination and surrogacy (Malhotra and Malhotra, 2012: 31), whilst other commentators estimate India has approximately 3000 clinics specialising in surrogacy (Sama, 2012: 7). Although it is difficult to draw a conclusive view as to the size and value of the international surrogacy industry in India from the competing overall estimates, it is clear that international surrogacy is continuing its upward trend, yet continuing to operate in a laissez-faire manner, showing little concern for protecting and upholding the rights of the child. The Assisted

Reproductive Techniques Bill 2010 (India) – which would introduce a legislative and policy framework for commercial surrogacy in India – continues to languish in legislative limbo, as it has done so through the course of successive parliaments over recent years (Ghosh, 2013: Indian Express, online). In Thailand, currently no legislation exists which directly governs international commercial surrogacy, however draft legislation (the Assisted Reproductive Technologies Bill number 167/2553) which would clarify the legal situation in Thailand relating to surrogacy is pending (approved, not yet adopted by Cabinet).

The growth in cross-border conception is reflected in a corresponding growth in numbers of applications coming before domestic courts in global North countries for regularisation of parent-child relationships (such as applications for parentage and adoption orders). Three Commonwealth/common law jurisdictions provide an illustrative snapshot (further detailed in Table 1 below). However, note that the sample of case law used is limited, given that it is based on all decisions lodged on relevant legal databases between 2008 and up to and including 28 February 2014. This does not give a full, comprehensive picture in terms of the global number of cases involving international surrogacy in each of these jurisdictions, as there are other routes (for example, ad-hoc ministerial decision-making and situations that do not come before courts), as well as other legal decisions not lodged in these legal databases (certainly true in the New Zealand context, and likely to be true in Australia and the United Kingdom). The sample included in this paper though does have value as an indicative sample, and whilst the numbers of cases falling within this particular sample are not large by any measure, they are indicative of a growth in commissioning parents from these countries engaging in international surrogacy. Many of these cases have a commercial element. Taken as a group, this body of case law illustrates that family courts in all three jurisdictions are dealing with a novel area of law concerning the rights of the child, in the face of any internationally agreed regulation of international surrogacy, a lack of explicit (or any) national legislation on international surrogacy, or national legislation and policy which is often difficult to reconcile with the phenomenon of ICS.

Table 1: Decisions of Courts in Australia, New Zealand and the United Kingdom, 2008-2014, dealing with applications arising in relation to international surrogacy situations (based on all decisions lodged on relevant legal databases up to and including 28 February 2014)

Jurisdiction	*Court*	*Total number of decisions dealing with applications related to international surrogacy situations 2008-2014*	*Reported case names and year of decision*	*Presiding Judge*	*Child's country of birth*
Australia	Family Court	11	*Collins v Tangtoi* [2010]	Loughnan J	Thailand
			O'Connor v Kasemsarn [2010]	Ainslie-Wallace J	Thailand
			Dennis v Pradchaphet [2011]	Stevenson J	Thailand
			Dudley v Chedi [2011]	Watts J	Thailand
			Johnson v Chompunut [2011]	Watts J	Thailand
			Hubert v Juntasa [2011]	Watts J	Thailand
			Findlay v Punyawong [2011]	Watts J	Thailand
			Edmore v Bala [2011]	Cronin J	India
			Gough v Kaur [2012]	Macmillan J	Thailand
			Ellison v Karnchanit [2012]	Ryan J	Thailand
			Mason & Mason and Anor [2013]	Ryan J	India
New Zealand	Family Court	7	*Re KJB and LRB [Adoption]* [2009]	Von Dadelszen J	Australia
			Re an application by KR and DGR to adopt a female child [2010]	Ryan J	Thailand
			Re an application by BWS & Anor to adopt a child [2011]	Walker J	USA
			Re Adoption by S and S [2011]	Walker J	USA
			Re DMW [2012]	DA Burns J	Thailand
			Adoption application by SCR [2012]	AP Walsh J	USA
			Re M S K [2013]	Strettell J	USA
United Kingdom	High Court Family Division	13	*Re W* [2013]	Theis J	USA
			Re P-M [2013]	Theis J	USA
			Re C (A Child) [2013]	Theis J	Russia
			Re C (A Child) [2013]	Theis J	USA
			J v G [2013]	Theis J	USA
			Re A & B (Parental Order Domicile)	Theis J	India
			D and L (Surrogacy) [2012]	Baker J	India
			Z and Anor v C [2011]	Theis J	India
			Re X and Y (Children) [2011]	Wall P	India
			IJ (A Child) [2011]	Hedley J	Ukraine
			L (A Minor) [2010]	Hedley J	USA
			Re K (Minors) (Foreign Surrogacy) [2010]	Hedley J	India
			X & Y (Foreign Surrogacy) [2008]	Hedley J	Ukraine

The total number of 31 cases across the three jurisdictions set out in Table 1 illustrates the growing body of jurisprudence across national courts pertaining

to international surrogacy and ICS. This is likely to continue to expand; for example, recent figures reported from the United Kingdom estimate that over 1000 babies born through international surrogacy may be brought into the UK annually (Blyth, Crawshaw, Van den Akker, 17 February 2014: Bionews, online).

3 The ethics and economics of commercialising conception

A strong argument exists for understanding this rapidly emerging growth in transnational reproductive services as the development of a new kind of "market", trading in human reproduction and fertility. Spar observes that:

> 'As technology made it easier for parents to choose all the components of assisted conception – the eggs, the sperm, the womb, the broker, and the governing jurisdiction – it was only a small and logical leap to international trade.' (Spar, 2006: 86)

However, what exactly is international commercial surrogacy a market in? A straightforward, black and white answer to this question would be that it is a market in surrogacy. Beyond this though, arguments can be made for this being understood as a market for the broader trade of human reproductive services, including the trade of human bodily products (gametes, embryos) for use for the conception of children to be carried to term by surrogates. Going a step further, the argument can be made that the growth of ICS has in fact brought with it the growth of a new market: in children, specifically produced to order in one place in the world, destined for another, the end "product" in a commercial transaction.

This paper does not seek to take up a specific position as to whether ICS amounts to the sale of children, but rather, it is intended that this paper at least raises these questions and issues for consideration.

These are highly controversial propositions to explore, given the difficult ethical terrain that they stray into, and the moral aspects they entail. But why this question matters in relation to children's rights in ICS is because although a market has for some time existed in the trade of gametes and embryos (with these human bodily products available for purchase in a number of states), under the international human rights framework, a market trading in children is prohibited by prescribed standards and norms. These are set down in international law and reflect that international consensus generally abhors such a practice as a fundamental principle. Moreover, as Ergas discusses, a strong argument exists for the prohibition on the sale and trafficking of children as a possible ius cogens norm (Ergas, 2013: 432-434), and it is questionable whether any future treaty governing international surrogacy would survive ius cogens scrutiny (Ergas, 2013: 434-435). Sandel notes that this relates to the value which we implicitly place on certain social practices or goods, through

deciding not to commodify them, or through explicitly excluding them from the realms of goods and services which can be bought and sold through the market: it follows that to reduce human beings to items which can be treated in such a way, fails to accord the appropriate value to them, as sentient beings to which dignity and respect inherently attach (Sandel, 2012: 9-10). Sandel is not alone in putting forth such an argument, which appears to accord with the approach taken by international human rights law, built on international agreement relating to the value accorded to children. The value the international community places on children, as reflected in international law, has nothing to do with money or commerce. In fact, it prohibits the commercialisation of children.

Regarding children as a specific subset of human beings, Sandel observes:

> 'We don't allow children to be bought and sold on the market. Even if buyers did not mistreat the children they purchased, a market in children would express and promote the wrong way of valuing them. Children are not properly regarded as consumer goods, but as being worthy of love and care.' (Sandel, 2012: 10).

Sandel takes his argument further to observe the growing trend of the market's reach into realms of life previously not governed by the market (Sandel, 2012: 28) and reasons that the value of certain things – such as human beings more generally, or concepts such as love – is degraded and corrupted through their marketisation (Sandel, 2012: 14-15).

Returning to the international legal framework then, this approach to how the international community "values" children is reflected in the consensus resulting in a number of relevant provisions at international law. The preamble to the United Nations Convention on the Rights of the Child (CRC, 1989) notes that particular care, including special safeguards, should be extended to children due to their specific stage in life. This flows through to the best interests of the child principle set out in art 3 of the CRC and the non-discrimination principle set out in art 2. This position is reflected in the International Covenant on Civil and Political Rights, which states the right of the child to "such measures of protection as are required by his status as a minor, on the part of his family, society and the State", without discrimination (ICCPR, 1966: art 24). Under the CRC, States Parties have obligations to provide a range of protective measures and specific safeguards in relation to children and their rights (for example, see arts 19, 20, 23). Similarly, the International Covenant on Economic, Social and Cultural Rights states that:

> 'Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation.' (ICESCR, 1966: article 10(3).

Article 25(2) of the Universal Declaration of Human Rights establishes – reflective of the social mores of the time – that all children shall enjoy the same "special protection", regardless of whether they are born in or out of wedlock (UDHR, 1948).

Turning to the position at international law regarding the sale of children, which relates to the ethical and economic question of value, the Convention on the Rights of the Child and an associated Optional Protocol to the Convention (2000) are indicative of the status of international agreement, and provide a framework of standards and norms to define actions and behaviour among and between states and citizens. The Convention on the Rights of the Child makes clear the position at international law on the sale of children. Art 35 is broad in this respect, and the threshold of expected action on States Parties is high:

> 'States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form'.

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child prostitution and Child pornography (2000) reflects the grave concern of the international community about international traffic in children for the purpose of sale, child prostitution and child pornography (Optional Protocol, 2000: Preamble). States Parties to the Optional Protocol are required to "prohibit the sale of children" in line with the Protocol (art 1). "Sale of children" is defined as being "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration" (art 2(a)).

Therefore, in considering the ethics and economics of conception in light of the clear standards and norms international law has established in relation to how children are to be valued (and thus protected), it is necessary to at least ask the question: does international commercial surrogacy amount to a market in the sale of children, commodifying them as a "product" to be traded, with the determination of their monetary "value" left open to the forces of the market? Or, should ICS be viewed as the provision of a specific package of services, that is, reproductive services provided by the woman who acts as a surrogate, and the services of associated medical clinicians and other actors in the industry? It is near impossible to get away from the reality that, if we are to identify the ultimate "product" in the commercial exchange which takes place in an ICS arrangement, it is a child. It is upon delivery of that child – once born, to the commissioning parent or parents – that the "transaction" is complete, and therefore it becomes difficult not to see this as falling into the definition set out by art 2(a) of "sale".

If we are to accept such a view, this raises confronting and difficult questions relating to the obligations of the State around the practice of ICS, and begs the question as to whether ICS is, in fact, inconsistent with international

human rights law. On the other hand, if we are to accept that ICS is a transaction which is predicated on and results in an exchange of reproductive services, the upshot of which is the birth of a child, this takes us away from the confronting and difficult question as to whether ICS is a commercial transaction for the sale of children. However, even if we accept this view, it is impossible to get away from the fact that in reality, no ICS arrangement can be said to be completed – certainly not in the eyes of the commissioning parents who are one party to such an arrangement – until the child who is born is in their care alone, once handed over to them (even if not literally) by the surrogate mother.

Looking at State practice to date in relation to ICS, it does not provide a conclusive view either way in relation to this vexed issue. There is very little international consensus in relation to international commercial surrogacy specifically, reflected in national legislative and policy approaches which variously outlaw the practice, tolerate it without an explicit regulatory or statutory framework, or explicitly legalise it (Trimmings and Beaumont, 2013: 443). On the face of it, this variation in state practice seems to show that some states do not view ICS as contradictory or in breach of their international human rights obligations. Yet the fact that other states expressly outlaw ICS through national law with extraterritorial effect (for example, New South Wales, Australia) can be seen to indicate that ICS is viewed in some states as inconsistent with international human rights law. In the case of some states, a reticence to engage with the issue has resulted in the legal position being somewhat unclear, arguably resulting in such states occupying a position of "permissibility" (Spar, 2006: 207) in relation to the practice of ICS. Indeed, the Permanent Bureau of the Hague Conference has questioned the feasibility of achieving international consensus on issues relating to international surrogacy, such as the question of unifying applicable conflicting private international law rules (Permanent Bureau, Hague Conference, 2012: para. 54).

Spar notes that in an abstract sense, the business model underlying the advent of international commercial surrogacy is a thoroughly reasonable one (Spar, 2006: 86). Indeed, if we are to take a purely market reasoning approach to ICS, that is, that if an exchange or trade of (any kind of) goods or services benefits both the buyer and seller, this leads to improving our collective or societal wellbeing. Goods are allocated efficiently, through the market, because the demand of the buyer is met by the supply of the seller. As Sandel notes, both sides are better off, their utility increasing. (Sandel, 2012: 29) However, Spar observes that:

> 'although eggs and sperm are now widely available in markets like the United States, it is tougher to find wombs. Because wombs come attached to women, who don't have any inherent incentive to endure the physical costs and emotional upheaval attached to pregnancy and labor. Purely in commercial terms, therefore, it makes sense to pay women for undergoing the rigors of pregnancy and thus to seek women for whom paid pregnancy is an economically attractive proposition.

> […] Some of these poor, young mothers will live in the developed world. But many more, demographically speaking will live in poorer nations of the developing world, where opportunities for poor, young women are even scarcer.' (Spar, 2006: 86-87)

Indeed, some commissioning parents will expressly want to ensure their surrogate is paid, and that to not pay such a person for what they are doing to enable them to have a child would be wrong. One commissioning mother from the United States who commissioned surrogacy in India has written that:

> 'Charges of 'renting a womb' and exploitation have long tarnished the practice of surrogacy. But in my mind, a woman going through the risks of labor for another family clearly deserves to be paid. To me, this was not exploitation. This was a win-win, allowing the surrogate to have a brighter future and the couple to have a child. If my money was going to benefit an Indian woman financially for a service she willingly provided, I preferred that it be a poor woman who really needed help because the money that a surrogate earns in India is, to be blunt, life-changing.' (Arieff, 2012: 37)

From these views, it can be observed that the commercial element of ICS leads to potential issues of global injustice (Spar, 2006: 87; 226-227; Sandel, 2012: 203) which are deserving of a dedicated discussion more comprehensive than is possible in this paper. Indeed, it is precisely to guard against the exploitation of economic inequalities that we explicitly ban a trade in human organs – such as kidneys and hearts – and arguably ICS presents simply a different human body part being transacted. Yet both Arieff and Spar appear to take up the position that ICS is a market in the trade of human reproductive services, not children themselves. Furthermore this supports the notion of ICS amounting to a "mutually advantageous trade" (Sandel, 2012: 29). However, Spar herself labels the international surrogacy and human reproductive market "The Baby Business", which granted, perhaps, is simply a more convenient and attention-grabbing label. Spar does further concede however, that taking an outsourced, market approach to the manufacturing of babies, in a similar way to the manufacturing of other "products" is a somewhat outlandish proposition, at least at the superficial level (Spar, 2006: 87), and that it is unclear what kind of market the "baby business" amounts to, but that it could constitute a "banned" or "imperfect" market (Spar, 2006: 204-206).

If we are to accept that ICS instead amounts only to a market in reproductive services only, it regardless still has the effect of commodifying children to an extent, given their centrality to ICS arrangements and the fact that such arrangements are only complete once a child is provided. Touched by commodification to any degree, the value we as a society place on children born through ICS may potentially be corrupted and degraded. In this connection, it is interesting to note that the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption has as one of its core purposes to guard against sale or traffic in children (Preamble; art

1(b)). However, it is also important to acknowledge the continuum on which international adoption and international surrogacy are both located. As Spar notes, adoption and fertility services are:

> 'two markets [which are] closely linked. Many people pursue fertility treatment because they are wary of adoption. Many others pursue adoption because they have grown weary of or dissatisfied with fertility treatment. Both sides of this market would prefer to believe that they are not substitutes for one another. But in reality, of course, they are. Everyone in the fertility market, everyone in the adoption market, and everyone who purchases eggs, sperm, wombs and PGD [Preimplantation Genetic Diagnosis] is looking for precisely the same thing: a child to call their own.' (Spar, 2006: 210)

4 Clash of rights: "parents", children and other parties

Whilst this paper argues for the child being placed at the centre of international commercial surrogacy arrangements, to ensure full realisation of their human rights, it is necessary to recognise the wider parties in ICS situations, not least the "commissioning parents". Understanding the full range of potential parties involved in ICS situations is critical to understanding the context in which children born through ICS come into the world, and to take a holistic approach to the child's rights (Achmad, 2012: 191-194). Due to the various possibilities for the genetic makeup of a child born through ICS, and the fact that a surrogate is involved, there are a number of parties who may claim to be a child's "parent".

Taking first the "mother" parent, this role in relation to the child may be claimed by a woman or women commissioning the child (therefore seen to be a "commissioning parent"); the woman who acts as the child's surrogate "mother"; and thirdly, the woman who provides her gametes (this could be the surrogate or the commissioning mother, or another third party, such as a woman who sells or donates her gametes for use). Turning to the "father" parent, this role may be claimed by the commissioning father or fathers, and potentially by a man who donates or sells gametes which are used in arrangement in instances where these are not provided by the commissioning father or fathers. This complex web of involvement in ICS arrangements amounts to there being potentially as many as four women who claim to be the "mother" in relation to a child born through ICS, and up to as many as three men who might claim to be a "father" to a child in an ICS arrangement. ICS proceeds on the expectation that the commissioning parent(s) is intended as the person(s) who will be the parent to the child – at least in a social sense. However, an argument can be made for each of these different people potentially involved in an ICS arrangement to be understood as a "parent" to a child who is born through the arrangement. The claim of the various potential parents can stem from a genetic or biological relationship to the child,

which cannot be displaced, as well as from an intention to parent the child, in the case of commissioning parents who sometimes have no genetic link to the child who is born.

The fact that ICS arrangements can lead to there being a multitude of adults involved who may claim to be a parent to any one child can lead to situations where the perceived rights of the different "parents" can clash with each other. A stark example of this is where a commissioning parent or parents and the surrogate mother have a clash of views in relation to matters such as what activities the surrogate avoids whilst pregnant, or what happens in an instance where tests indicate that a child is likely to be born with a birth abnormality or condition. In such instances, the commissioning parents seek to control more than just the surrogate's womb, but her whole body, and her rights being endangered or violated (for example, such as rights established under arts 11 and 16 of the Convention on the Elimination of all Forms of Discrimination Against Women, 1979).

Having alluded to the potential for clashes between the positions and rights of the various potential "parents" in ICS arrangements, where the concept of a clash of rights is most clear is when one considers the rights of the child in relation to the adults in its life who may have a parental claim in relation to him or her. What is in the interests of any one of the potential "parents" may not always be in the best interests of the child, nor uphold and protect their rights. However, the child is most likely to be the person in ICS arrangements with the most heightened level of vulnerability. Whilst the point can validly be made that commissioning parents can be vulnerable to being taken advantage of in ICS, and surrogate mothers – especially in the global South, where they are often economically and socially marginalised – are potentially very vulnerable to human rights violations (especially in situations where they are coerced into acting as a surrogate against their will (Center for Social Research, 2013: 39), not given appropriate support or properly informed about the arrangement, or not paid as they are told they will be (Center for Social Research, 2013: 23)), it is the child that is most universally open to the potential of human rights breaches in ICS. This is because of the inherent vulnerability that a child is characterised by, due to their lack of agency and inability, especially in their infancy and early years, to voice their wishes and to form views in relation to, and have control over what is in their own best interests. The child's evolving capacities as they advance in age means that the child's agency over their own interests and rights grows (Lansdown (for UNICEF), 2005: x-xi), however, in ICS situations the child may well be placed in a position of heightened vulnerability with no ability to have control over their own rights and interests (very early in their life).

To illustrate, a practical instance of this may arise in ICS situations in relation to the taking of DNA samples from a child for the purpose of determining legal parentage. It is likely to be unclear in ICS arrangements as to who is in a position in relation to the child to be able to authorise the taking of

a DNA sample, and this may then lead on to issues around evidential admissibility if the case goes before a court (Keyes and Chisholm, 2013: 115). This raises the issue of whether having a DNA sample is in the best interests of the child. This lack of agency is particularly problematic if a person claiming to be the child's parent does not act (either intentionally or by omission) in the child's best interests to protect the child's rights. Therefore, the question of who acts on behalf of and in the best interests of the rights of the child born through ICS is one that may not, on the surface of an ICS arrangement, be easily determined. At its worst, a situation could eventuate where no one is acting in the best interests of the child in an ICS arrangement – not necessarily out of malice – this could be purely through a lack of information or foresight. Given lack of international regulation and standards, there is no requirement for an independent third party to be assigned to the child to advocate for their rights and best interests to be upheld in ICS arrangements. This may result in a protection lacuna for the child, if their rights and best interests are not effectively upheld and realised. Moreover, when ICS cases come before courts, it will not always be automatic as a matter of procedure that the child is independently represented, which again may have implications for the rights of the child.

Above we have considered parents and children as part of this "clash of rights" in ICS, however, it is important to briefly note that other parties are very likely to be involved in ICS arrangements. This is significant due to the potential for these parties to influence the actions of or positions taken by the various potential "parents" in ICS arrangements. Other parties may include surrogacy or medical tourism brokers, government officials in the commissioning parents' home state and the state where the child is born, lawyers, medical doctors and other medical staff or fertility experts. Each of these parties may approach an individual ICS arrangement with their own vested interests and motivations, which may not always be in line with protecting the best interests of the child. It would be of great benefit to children born through ICS if professional and other third parties involved in ICS situations increase their focus on and commitment to taking a child-centred perspective in their practice, or at least to incorporate awareness of what this entails.

5 The rights of the child at stake

Having examined some possible ethical and economic perspectives on ICS and highlighted the various potential parties and their respective interests, this section hones in more closely on the broader international human rights law framework governing the rights of the child. The Convention on the Rights of the Child is the primary relevant framework in this respect. Provisions of the Convention which are of particular relevance to ICS situations are discussed below. Whilst this discussion is not intended to be exhaustive (for more, see

Achmad, 2012: vol. 7:8, 206-211), it is intended to assist in identification of some of the rights of the child which are left most at risk in ICS situations. It is these rights, along with the protection of the best interests of the child, which it is important, in the first instance, to be conscious of upholding, protecting and giving effect to in ICS.

5.1 The rights of the child to identity and nationality

As illustrated through earlier discussion of the various parties involved in ICS, and more specifically the range of persons who may claim to be a "parent" in relation to a child in these situations, the circumstances of birth of children born through ICS are likely to be complex. This raises potential challenges for the child's rights to identity and nationality. In fact, these are arguably the biggest child's rights issues arising out of ICS, given the long-term impact flowing from the realisation of both of these rights in the life of a child.

5.1.1 The child's right to the preservation of their identity

Firstly considering identity, without intentional steps being taken to protect information about the circumstances of their birth and information relating to their personal genetic lineage and cultural heritage, the identity of children born through ICS will likely be placed in a precarious position. As national judges have observed, in the absence of such steps being taken, this will very likely lead to repercussions for the child in later life, around their understanding of who they are as a person (for example, see *J v G* [2013] EWHC 1432 (Fam) at [27]). The Australian Family Court has described this as the concept of "lifetime identity" (*G v H* (1994) 181 CLR 387; applied in the international surrogacy case of *Ellison and Anor v Karnchanit* 2012 FamCA 602 at [91]). Van Bueren describes an individual's identity as being:

> 'at root an acknowledgement of a person's existence; it is that which makes a person visible to society. An identity transforms the biological entity into a legal being and confirms the existence of a specific legal personality capable of bearing rights and duties.' (Van Bueren, 1998: 117).

Art 8(1) of the CRC requires States Parties to the Convention to "undertake to respect the right of the child to preserve his or her identity". This article states that "identity" includes "nationality, name and family relations as recognised by law". The Committee on the Rights of the Child has not published a General Comment in relation to the child's right to preserve his or her identity. However, to think about the elements which are central to a person's identity, in addition to nationality, name and family relations, other significant aspects are culture, language, ethnic heritage, and genetic history. Writing as early as 1992, Stewart argued that at its broadest conceptualisation,

the child's identity could and should be said to include culture and language as important elements (Stewart, 1992). Van Bueren further advocates for race, sex and religion to be considered component elements forming a child's identity (Van Bueren, 1998: 117). Hodgkin and Newell, writing on behalf of UNICEF, have more recently sought to confirm the view that nationality and family are only some of the elements of identity (Hodgkin and Newell, 2007: 115) and therefore art 8 should not be read as putting forward a concept of the child's identity as limited to those elements explicitly mentioned in the Convention texts. Importantly, Hodgkin and Newell note that a further key element is "the child's personal history since birth – where he or she lived, who looked after him or her, why crucial decisions were taken" (Hodgkin and Newell, 2007: 155).

For children born through ICS, it is these aspects of their identity as related to their surrogate mother and their genetic parents – where they are different persons to the commissioning parents – which are vulnerable to not being preserved. Given the lack of international regulation of ICS, and the varying levels to which ICS is permitted or regulated in different jurisdictions, no system currently exists which is directed towards safeguarding the child's right to preserve their identity. Such a system has been important, for example, in the international system of protection which exists around intercountry adoption. Art 30 of The Hague Intercountry Adoption Convention requires steps to be taken by Contracting States to ensure information about the child's origin, particularly the identity of the child's parents and their medical history, is preserved. In the absence of a directive protection framework in the context of ICS, a strong argument can be made for those involved in ICS situations – especially commissioning parents – to be conscious of the need to protect all aspects of the child's identity, so that information about these are preserved for the child so that they can understand the full circumstances of their birth, and gain a full picture of their identity in the future at an age where they are ready or wish to do so. Sometimes, commissioning parents will be acutely conscious of this need, for example the commissioning parents in *Ellison* were observed to have given considerable thought to the children's future welfare and needs, including identity and culture (*Ellison*, 2012: at [122]). However, this is not always the case, and there is a need to build better awareness among persons involved in ICS of the need to preserve the child's identity and the many quite straightforward steps which can be taken in this respect.

Correspondingly, whether the State also has a corresponding duty to take steps to assist the child to preserve their identity in ICS situations is a relevant question. Note that art 8(2) of the CRC states that:

> 'Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.'

In this regard, Hodgkin and Newell generally note that "appropriate assistance" could include (among other things):

> 'making available genetic profiling to establish parentage; […] ensuring that any changes to a child's identity, such as name, nationality, parental rights of custody etc., are officially recorded; enabling children to have access to the professional files maintained on them.' (Hodgkin and Newell, 2007: 117).

The role that the State may play – or is arguably under a duty to play – in preserving the child's identity in ICS situations is a complex one, requiring future consideration outside of the scope of this paper (and one which the author intends to explore comprehensively in the course of her current doctoral study).

Finally in relation to the child's rights connected to identity, it is necessary to acknowledge that in ICS situations, given the reality that gametes or embryos from anonymous donors are sometimes used, it will not always be possible for all aspects of the child's identity to be preserved, in instances where no system is in place to facilitate future contact between donors and children born. Consequently, in situations where anonymous genetic material is used, information relating to the child's genetic history, cultural heritage and "mother tongue" flowing from a genetic parent or parents may never be able to be established. Similarly, in instances where a surrogate mother acts anonymously and information about her is not recorded and provided to the commissioning parents, or safeguarded for the child to be able to directly access later in life of their own accord, information tied to the child's biological carrier (who will sometimes also be the child's genetic mother) will again be aspects of the child's identity which will fail to be preserved. The lack of preservation of this kind of identity related information could have implications for the child as they grow up and develop their capacity to understand the circumstances of their conception and birth. It is a natural part of development as a person to ask "who am I?", and without all aspects of identity information being made available, the child's right to preservation of identity in ICS situations may be difficult to fully realise, even beyond reach of the State. At a practical level, arguably the most powerful role to be played in protection of this kind of information is by private providers of fertility and surrogacy services, as a first line of enforcement, given they are most likely to be the party facilitating contact with all primary parties to an ICS arrangement. However, the status quo is that there are differing levels of attention and understanding towards these issues, and they are not usually made a central priority in ICS in places such as India and Thailand. To give effect to art 8 of the CRC in the ICS context, national regulatory and protection frameworks – or an international regulatory and protection framework – could helpfully establish such requirements and obligations for collection and retention of information identity by private actors. Under such frameworks, state actors could usefully play a role in storing and protecting such information. The corollary to this would be state actors facilitat-

ing access to this information, analogous to systems in place around the world aimed at safeguarding and facilitating access to information relating to donor conceived children (for example, in the New Zealand context see Part 3 of the Human Assisted Reproductive Technology Act 2004).

5.1.2 Nationality

Identity and nationality are closely linked, and in situations where a child's right to nationality is not upheld and given effect to, this will likely have an impact on their right to identity. Indeed, as observed above, art 8(1) of the CRC expresses nationality as an explicit key element of the child's right to preservation of his or her identity. The central importance of nationality to a human's dignity and worth is illustrated in instances of ICS where a child's nationality is not established, as has been the case in many ICS arrangements to date, triggering a myriad of challenges to the rights of the child (for example, see *Baby Manji Yamada v. Union of India & ANR*, *Jan Balaz v Anand Municipality*, and *Re an application by KR and DGR to adopt a female child*. As art 7(1) of the CRC makes clear, the child is entitled from birth to the right to acquire a nationality. This right is also recognised by art 24(3) of the ICCPR.

Despite the importance for the child of enjoying their right to nationality from birth, in practice, the issue of nationality is often one of the thorniest in ICS situations. It is often one of the first issues relating to a child's rights presenting as a challenging to give effect to in ICS arrangements. This is due to the practical nature of the concept of nationality, in that it triggers other protections, such as citizenship, the right to freedom of movement (art 13, UDHR) and the right to return and leave one's country of nationality (art 12, ICCPR), and the ability to hold a travel document issued by the corresponding state of nationality. One thing that can be said to be archetypal about ICS arrangements is that the commissioning parents intend for the child that is born through the arrangement to travel back to their home state with them following the child's birth. Nationality and a valid travel document which enables the child to travel across borders and enter the commissioning parents' home state are the keys to this (or in the absence of nationality, as has been seen in practice, the requirement for a valid temporary visa to allow the child to reside in the home State of the commissioning parents). However, in ICS situations, it may be difficult, due to the complex nature of the child's birth situation, and largely conflicting national laws related to legal parentage and nationality, to establish the child's nationality in any straightforward way, and therefore the child may not be able to travel with the commissioning parents as they had planned.

This practical issue, which is entwined with the child's right to nationality – and by extension – preservation of identity, has recently been playing out in relation to a number of children born in Thailand to surrogate mothers through surrogacy arrangements undertaken by Israeli commissioning parents.

Under Thai law, such a child is viewed as the child of the Thai surrogate mother, and therefore a holder of the Thai nationality. As a result, the surrogate mother is recognised as having full parental rights in relation to the child. (Goldman, 2014: The Times of Israel, online). In the face of this, the children born through these arrangements were not recognised as Israeli nationals and therefore refused Israeli passports, unable to return to Israel with their commissioning parents. This situation was resolved in early February 2014 through a diplomatic agreement between the Israeli and Thai governments, whereby an Israeli passport will be issued to the child if the surrogate mother signs a letter stating she is relinquishing the child, and this is delivered to the Israeli embassy in Thailand (Carr, 2014: Bionews, online).

Whilst an ad-hoc diplomatic solution was able to be reached in the Israel-Thailand situation described above, and in that situation, the children involved did acquire the nationality of their surrogate mother from birth, the upshot of a complete lack of nationality, where all relevant states refuse to recognise a child born through ICS as a national, is that the child's right to acquire nationality from birth and to hold nationality in an on-going manner is violated. As Harland notes:

> 'It is not just as a result of the lack of parental status of the intended parents, but the child not being entitled to the nationality of the surrogate. India and Ukraine are examples of this.' (Harland, 2013: 3).

Such a child is effectively rendered stateless until a point in time that they are recognised as holding the nationality of a particular state. These issues, including statelessness, have come into play in widely reported cases such as *Baby Manji Yamada v Union of India & ANR*, and *Jan Balaz v Union of India*. However, the CRC makes clear the obligations of the state in this respect. Art 7(1) of the CRC establishes that States Parties shall ensure the implementation of the child's right to nationality "in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless." In practice however, ICS is a relatively new issue confronting states (both ICS "demand" and "supply" states), which are still grappling to decide what approach they will take in response to issues such as nationality of children born through ICS. This can trigger unfortunate impacts on the child's ability to enjoy their rights, and in extreme situations the outcome for the child is statelessness.

5.2 The right of the child to grow up in a family environment

It would seem safe to say, that in the majority of ICS situations, commissioning parents are fully committed to providing a family environment for the child that they have gone to great lengths to have in their lives, and which they

plan to provide with an upbringing characterised by love and happiness. In such situations, it is arguable that a surrogacy arrangement is built much more on love than money. Indeed, the preamble to the CRC recognises that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment". Art 7(1) of the CRC develops this notion further, specifying that the child has "as far as possible, the right to know and be cared for by his or her parents". Other provisions of the Convention emphasise and reinforce the importance of the child's right to grow up in a family environment (for example, arts 5, 10, 19, 20). In the context of international surrogacy, Harland asserts that:

> 'It is in a child's best interest for the reality of child's (sic) family life to be legally recognised. Children's human rights are entwined, bound up with the human rights of their parents.' (Harland, 2013: 3)

Despite recognition that it is most likely that commissioning parents enter into ICS arrangements with positive intentions in relation to the eventual child, the possibility of persons entering into ICS arrangements with more untoward intentions cannot be completely ruled out and must be guarded against. The notorious Baby 101 surrogacy and human and child trafficking ring, exposed in 2011 (BBC, 2011: online) demonstrates human rights violations that can be effected under the guise of international surrogacy. Cases such as this can bring many of the child's rights – far beyond the right to grow up in a family environment – under threat, as well the rights of women. Such cases will, however, most likely be exceptional in the global context of ICS. To consider a less extreme situation that may endanger the child's right to grow up in a family environment – but a situation that cannot be ruled out in any ICS arrangement – is the situation which can arise when no potential "parent" to the child assumes responsibility for caring for the child deserves consideration. Such a situation can arise when the commissioning parents renege on the ICS arrangement, the surrogate mother does not wish to care for the child or is anonymous and cannot be traced, and the genetic parents, if they are separate to the commissioning parents and surrogate, also reject being responsible for the child or are anonymous and untraceable. Such circumstances will challenge the child's ability to enjoy their right to grow up in a family environment, triggering art 20 of the CRC. It will then likely fall to the State to ensure alternative care of the child (art 20(2)) and to provide him or her with special protection and assistance (art 20(1)). In ICS cases, which state should bear such responsibility is likely to present a conundrum, and is again an issue worthy of benefitting from future consideration and analysis.

5.3 The rights of the child to health, education and social security

Following on from the types of situations discussed above, whereby a child born through ICS may be left "parentless", it is important to briefly mention that the child's social and economic rights, such as those to health and health care services, education and social security may be threatened. Other commentators note that the child's entitlement to child support and inheritance may also be precarious (Gamble, 2013: Online). This is because the child's rights in relation to social and economic services often flow from or are tied to a person being recognised as the child's parent, or from their status as citizens of a particular state (Harland, 2013: 4). Therefore, without the recognition of legal parentage (and nationality and citizenship, where these are lacking), these rights of the child may be placed in jeopardy.

Difficulties may also arise for a child in this respect who is born through ICS even if, for example, the child's commissioning parents assume care for the child and the child is able to return with them to their home State without a legal parent-child relationship being established; the child may well remain in a protection vacuum regarding some of their economic and social rights. These issues have been well traversed, for example, in the long-running case of *Mennesson v France* (which has been taken to the European Court of Human Rights and is pending). The social and economic rights of the child are crucial for commissioning parents to consider prior to entering into ICS arrangements, in order to be informed as to what the practical implications of the child being born through ICS may lead to, and to make decisions which could help prevent the child potentially being disadvantaged in future. Similarly, states need to engage in further consideration as to how a child born through ICS is viewed under their domestic legislation and policy in relation to the realisation of their social and economic rights, fulfilling their obligations under international human rights law, as they will, sooner rather than later, likely be confronted with these issues as ICS grows.

6 International approaches to the rights of the child in international commercial surrogacy situations

So far, this paper has traversed some of the ethical issues related to ICS, as well as examining the potential clash of rights and interests between the parties to ICS. It has examined aspects of the ethical, economic and human rights framework relevant to ICS, particularly the rights of the child most at risk of violation in ICS arrangements. Set against the context of this ethical and legal framework, and in the absence of any international agreement on ICS, this section provides a high-level overview of some of the different approaches being taken in response to ICS internationally, with a specific focus on examination of how and to what extent they relate to the rights of the child. This

discussion limits its reference to a focus on the responses taken by three Commonwealth nations/common law jurisdictions which can all be characterised as "demand" States in the international market of ICS: New Zealand, Australia and the United Kingdom. However, the discussion could of course be extended in the future to a wider sample of states, to provide a more global assessment of international approaches in response to ICS relating to the rights of the child.

This section is divided into two subparts; the first looks at the rise of national guidelines or government guidance (in these national jurisdictions) as a quasi-policy response to ICS, and the second provides a high-level analysis of aspects of judicial decision-making about the rights of the child in ICS case law.

6.1 The rise of "national guidelines" or government guidance as a response to international surrogacy: aspects relating to the rights of the child

As a response to international surrogacy, demand States have, over recent years, begun to take what can be viewed as a quasi-policy approach through the issuing of national guidelines or government guidance. These are published on government domain internet pages. The general purpose of such guidance is twofold. One national purpose is to provide citizens or residents of the State with information about aspects of undertaking an ICS arrangement as they relate to national law and policy. This information is relevant before, during, and after an ICS arrangement is undertaken. The second purpose is to highlight the various risks and potential pitfalls inherent in ICS arrangements, information which is of most relevance prior to embarking on an ICS arrangement. It should be noted that although this section limits its analysis to guidance of this nature from Australia, New Zealand and the United Kingdom, these are not the only states to have issued such guidance. Ireland issued guidance in 2012 (Department of Justice and Equality, Citizenship, Parentage, Guardianship and Travel Document Issues in Relation to Children Born as a Result of Surrogacy), and India provides an example of an ICS supply State that has gone some way towards providing guidance attempting to regulate aspects of the practice of ICS (Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India; Ministry of Home Affairs Government of India, Statement on Surrogacy, 2013). Australia, New Zealand and the United Kingdom have all taken slightly different approaches in issuing this guidance. Positively, each piece of guidance includes aspects relating to the rights of the child, however, they differ in the extent to which this is made a focus of or emphasised by the guidance. It is important to note that these pieces of guidance all relate to international surrogacy generally, thus including both international commercial surrogacy and altruistic international surrogacy.

6.1.1 New Zealand: International Surrogacy Information Sheets and Non-binding Ministerial guidelines

New Zealand was the first of these three States to publish this kind of information and advice, with the publication of the International Surrogacy Information Sheet (including Non-binding guidelines) in June 2011. This reflects a proactive approach in the absence of any explicit national legislation or policy regulating international surrogacy (of any kind). It can also be seen as a response to the fact that Child, Youth and Family, the service line of the Ministry of Social Development responsible for child welfare and protection and family support, had not heard of an international surrogacy case before 2010, but by August 2011 had received 63 enquiries from people in New Zealand exploring international surrogacy (Dastgheib, 2011: Dominion Post, online). The Information Sheet and Non-binding guidelines are jointly published by Child, Youth and Family, Internal Affairs, and Immigration New Zealand. A stated aim of the Information Sheet is to outline "some of the key issues for New Zealanders thinking about international surrogacy", and urges New Zealanders to seek independent legal advice prior to embarking on any international surrogacy process, along with advice to contact relevant government departments.

The New Zealand Information Sheet has a strong focus on the rights of the child, making clear that New Zealand law applies in international surrogacy situations concerning New Zealand citizens or resident commissioning parents. It highlights the need for a legal parent-child relationship and emphasises that without this, commissioning parents do not have any ability to make decisions about the child's needs including medical treatment and schooling (New Zealand Government, 2011: International Surrogacy Information Sheet: 1). The Information Sheet clearly states the requirements regarding New Zealand citizenship and nationality that govern the situation of children born through international surrogacy (p.3). The importance of establishing a family environment for the child is highlighted (p.2), and emphasis is placed on the need to take steps to preserve the child's identity. The key paragraph reads:

> 'According to the United Nations Convention on the Rights of the Child, every child has the right to family relationships and parental guidance, the preservation of identity and access to appropriate information. Therefore, although it may not be required in the jurisdiction where the surrogacy arrangement is made, when an egg or sperm donor is being used you will need to have as much information as possible about the identity of that person available. This information will become very important for the child in the future, should he/she wish to find out more about his or her genetic and/or ethnic identity. It could also be useful in addressing any future medical concerns.' (p. 2)

Furthermore, the Information Sheet states that "all decisions regarding international surrogacy should be made in order to uphold the best interests of

the child." (p.4) The inclusion of this kind of information on the rights of the child is very positive, as it will ideally have the effect of encouraging prospective commissioning parents to consider these kinds of issues and impacts on any future child they may have through international surrogacy, before embarking on any such arrangement, and bearing them in mind if they pursue ICS.

The New Zealand Information Sheet includes as an Annex a set of "Non-binding Ministerial guidelines" which:

> 'Ministers are likely to take into account if and when they are deciding to exercise statutory discretion to issue a visa or grant citizenship for a baby born as the result of a surrogacy arrangement overseas, who would otherwise not be able to enter New Zealand or be granted citizenship' (p. 5)

The Non-binding Guidelines are a set of 11 key factors, all of which can be seen to relate to the rights of the child in some way. However, of particular note are the following inclusions in the guidelines: the Minister may consider "The outcome that is in the best interests of the child" (therefore aligning with art 3 of the CRC); "The nature of the surrogacy arrangement, i.e. is it altruistic or commercial?" (this relates to art 35 of the CRC); "Whether there is a genetic link between at least one of the commissioning persons and the child" (relating to the right of the child to grow up in a family environment, and the art 7 CRC right of the child to know and be cared for by his or her parents); and "Steps taken by the commissioning persons to preserve the child's identity e.g. do the commissioning persons intend to retain information about the child's origins?" (alignment with the child's rights under art 8 of the CRC). Taken together, these factors reinforce the key rights of the child under the CRC which are particularly important in international surrogacy situations. They provide Non-binding guidelines which, if considered, will lead to discretionary ministerial decisions that will likely seek to protect and uphold the rights of the child. The Non-binding guidelines are an innovative approach to seeking to encourage ministerial discretionary decision-makers to consider the rights of a child when faced with complex factual scenarios and the role of making a decision affecting the lives of a number of people, including a potentially vulnerable child.

Finally in relation to New Zealand, in June 2013 the New Zealand government (the same government agencies which published the earlier Information Sheet, plus the Ministry of Foreign Affairs and Trade) published a new, additional information sheet, entitled Information Sheet: International Surrogacy in India. This was published in response to new surrogacy guidelines issued by India for foreign nationals traveling to India for surrogacy (New Zealand Government, Information Sheet: International Surrogacy in India, 2013: 1), and urges that "any individual considering pursuing international surrogacy should exercise extreme caution, seek independent legal advice, and keep up to date with any developments." (p.1) The Information Sheet reproduces

relevant parts of the Indian government direction, which introduces more stringent requirements and conditions applying to international surrogacy in India, requiring foreign nationals travelling to India for surrogacy to hold a medical visa, for which there is a narrower eligibility criteria, and specific conditions must be met before such a visa is granted (p.1). One of the conditions is the provision of a letter from the applicant's home State government, stating that the country recognises surrogacy, and that the child or children born through the surrogacy in India will be permitted entry to that country, "as a biological child/children of the couple commissioning surrogacy". The New Zealand Information Sheet: International Surrogacy in India is absolutely clear that the New Zealand government cannot produce such a letter, due to the fact that commercial surrogacy is prohibited under New Zealand law and New Zealand law does not recognise such a child as the biological child of the commissioning parents (even if one or both are genetically related to the child) (p.2). The Information Sheet states that a letter from the New Zealand government outlining surrogacy law in New Zealand can be requested from the Ministry of Foreign Affairs and Trade. Importantly, this Information Sheet notes that there is no guarantee that an exit visa will be granted for a child born in India through international surrogacy, and that this may leave the child in a highly vulnerable position (the implication being statelessness and violation of his or her associated rights).

6.1.2 Australia: "Fact Sheet 36a on International Surrogacy Arrangements"

The Australian government published its Fact Sheet 36a on International Surrogacy Arrangements in 2012, as a web page of the Department of Immigration and Border Protection. The Fact Sheet outlines Australian law relevant to international surrogacy situations, aiming to inform persons considering commissioning international surrogacy as to the risks involved, and requirements under Australian law. The Fact Sheet urges persons considering international surrogacy to seek independent legal advice prior to starting any process, as well as contacting the Australian immigration office responsible for the country that the surrogacy would take place in.

The Fact Sheet explicitly notes that as a States Party to the CRC and other relevant international conventions, Australia is "committed to protecting the fundamental rights of children" (including preventing the sale or trafficking of children), and that:

> 'Extreme caution is exercised by us in cases involving surrogacy arrangements that are entered into overseas, so as to ensure that Australia's citizenship provisions are not used to circumvent either adoption laws or other child welfare laws.'

The Fact Sheet goes on to highlight specific issues pertaining to the rights of the child, such as the right of the child to nationality and the requirements for a child to be recognised as an Australian citizen and to gain an Australian

passport. Related to this, the impact for a child of not having legal parents recognised in relation to it is mentioned. Such an explicit statement relating to the rights of the child and Australia's international human rights law obligations is to be welcomed. The Fact Sheet specifies the Australian states and territories with legislation making entering into an international commercial surrogacy arrangement a criminal offence, and further states that sponsorship of a child for a visa to enter Australia by a sponsor who has a conviction or an outstanding charge for an offence against a child is not possible (also applicable if the sponsor's spouse or de facto partner falls into such a category). Only limited exceptions will be made, and there must also be "no compelling reason to believe that the grant of the visa would not be in the best interests of the child".

The Australian Fact Sheet is predominantly focused on citizenship and visa issues and laws related to children born through international surrogacy. As such, its focus on the rights of the child is quite limited to nationality and family environment (relating to the child's art 7 rights in the main), as well as the best interests of the child principle (art 3). The Fact Sheet does not focus on issues relating to the preservation of the child's identity, other than the requirements it sets out around DNA testing to establish legal parentage of a child born through international surrogacy.

Connected to the Fact Sheet, in 2013 the Australian Government published a new web page on the Australia High Commission in India's website, relating to the (then) new Indian guidelines introducing the requirement for foreign nationals travelling to India for surrogacy to apply for a medical visa to enter India. Unlike the New Zealand Information Sheet relating to India, the Australian webpage does not reproduce excerpted parts of the Indian guidelines. However, it does include a link to a letter from the Australian Government (undated), which Australian commissioning parents can download and use to support their application for an Indian medical visa, if they are satisfied that they meet the Indian visa requirements. The letter provides information on the position at Australian law related to legal parentage, citizenship, passports and entry visas, as well as specifying the Australian states and territories where it is illegal for residents to enter into an international commercial surrogacy arrangement. The letter does not clearly state that a child born through international surrogacy will be permitted entry to Australia as the biological child of its commissioning parents. Rather, it explains that:

> 'Most states and territories in Australia have legislated to regulate surrogacy arrangements in Australia and have provided for transfer of the legal parentage of children where the surrogacy arrangement meets the requirements set out in legislation'

and that to enter Australia to live, a child born through international surrogacy will have to have Australian citizenship by descent or enter on a permanent visa. Therefore, the letter is surely not guaranteed to be viewed by the Indian

government as meeting the requirements and conditions specified for eligibility for the grant of a medical visa for international surrogacy.

6.1.3 United Kingdom: "Guidance: Surrogacy Overseas"

In early February 2014, the United Kingdom Foreign and Commonwealth Office published online its Guidance on surrogacy overseas. This official guidance is to inform prospective commissioning parents from the UK as to the issues they should be aware of and may encounter through international surrogacy (note that the UK Government Border Agency has also published its own internal guidance for use by entry clearance staff regarding the handling of international surrogacy visa applications made outside the UK). The UK's Guidance: Surrogacy Overseas is a response to the reality that:

> 'British Embassies and High Commissions are dealing with an increasing number of people who are choosing international surrogacy as an alternative route to parenthood, with more and more parents heading to the US, India, Ukraine and Georgia to enter into surrogacy arrangements.'

Indeed, last year the UK judiciary continued to urge the government to take active steps to inform and educate prospective commissioning parents about international surrogacy, with Mrs Justice Theis observing, obiter dicta, that:

> 'The message needs to go out loud and clear to encourage parental order applications to be made in respect of children born as a result of international surrogacy agreements, and for them to be made promptly.' (*J v G* [2013] EWHC 1432 (Fam), at [30])

The UK Guidance provides similar warnings as the Australian and New Zealand guidance, directed at prospective commissioning parents about the risks of international surrogacy, but is more comprehensive in terms of the contextual information it provides. The Guidance makes clear that a genetic link between one of the commissioning parents and any child born through international surrogacy will likely need to be proven for the granting of British nationality to the child. The Guidance cautions in relation to the child's genetic identity that:

> 'Several cases have come to light where there is no genetic link between the intended parents and the child born through a surrogacy arrangement. We recommend that you make sure that you work with a reputable clinic which can satisfy you at an early stage that the child is genetically linked to you.' (United Kingdom Foreign and Commonwealth Office, Guidance: Surrogacy Overseas, 2014: 2).

The Guidance predominantly focuses on legal parentage in relation to children born through international surrogacy, and the steps in relation to nationality, citizenship and visas for the child that commissioning parents will need to take in order to be recognised as a child's legal parent(s). Aligning with art 7 of the CRC, the Guidance specifically discusses how to register a child's birth with a British Embassy overseas in instances where a commissioning parent is able to directly pass on British nationality to a child. Notably, the Guidance itself is very light on content pertaining to any further protection of the rights of the child, with a much stronger emphasis on parental rights. The Guidance makes no mention of the UK's international obligations relating to the rights of the child, nor to the CRC itself or the principle of the best interests of the child. Furthermore, the Guidance includes no mention of any protection measures or requirements which would have the effect of safeguarding a child's right to the preservation of their identity.

However, the Guidance does include an annex entitled "List of documents required when applying for a passport without registration in surrogacy cases" (pp. 7-8), which includes, among other things, mandatory provision of evidence that the commissioning father is the biological father of the child (DNA evidence may be required); a "surrogacy agreement on official headed paper […] signed by all parties and dated"; a witnessed "Document signed by the surrogate mother which confirms that the surrogate mother gives up parental responsibility and custody of the child."; the child's birth certificate as issued by local authorities; "photographs of the commissioning parents and baby from birth to time of application; antenatal medical reports and scans from the surrogacy clinic/hospital covering the entire duration of the pregnancy"; "Letter from the Head Doctor at the surrogacy clinic setting out the details of the case"; marriage certificates of the surrogate if she has been married; and "Identity documents for the surrogate mother, e.g. passports, identity cards, driving licence". The requirement for such documentation may well have a positive impact on upholding and enforcing child's right to identity, if that information is properly safeguarded by the State and/or the commissioning parents, for the child's future access in later in life.

It is worth noting that the UK Guidance does address the issue of international commercial surrogacy slightly more explicitly than the Australian or New Zealand fact and information sheets, alluding to the fact that this may impact on commissioning parent's ability to bring a child born through ICS back to the UK and to be recognised as a legal parent to the child. The Guidance states that:

> 'Although you are entering into a surrogacy arrangement overseas, if you intend to settle in the UK you must comply with UK law. You should be aware that offering commercial brokering services to set up surrogacy arrangements in the UK is illegal. You are allowed to pay reasonable expenses to the surrogate mother. These expenses will be considered by a UK family court when seeking a UK parental order.

> You should bear this in mind when entering into a surrogacy agreement overseas.' (p. 1)

However, the Guidance makes no mention of guarding against the sale or trafficking of children, or the UK's international obligations in this respect.

Information on specific requirements pertaining to international surrogacy in India is incorporated into the body of the Guidance (p.6). A letter from the UK government (dated 01 May 2013) appears as an annex, enabling commissioning parents applying for a medical visa to India to use this in support of their application to the Indian government for entry to the country for the purpose of surrogacy. The letter notes that:

> 'the United Kingdom recognises surrogacy in India so long as it meets the conditions set out by the UK Human Fertilisation and Embryology Act 2008. The Act allows for a child to be treated in law as the child of a couple if the child is genetically related to at least one of the commissioning couple and no money other than reasonably incurred expenses has been paid in respect of the surrogacy arrangement.'

Therefore, the UK makes clear its line in the sand relating to commodification of children and human reproduction. The letter emphasises that due to the varying factual scenarios possible in international surrogacy:

> 'the way that a child born as the result of a surrogacy arrangement through an Indian surrogate mother may be brought into the United Kingdom will depend on individual circumstances.' (p. 11).

The letter concludes by specifying the three possible routes for a child born in India through international surrogacy to UK commissioning parent(s), and the different entry possibilities arising out of each. Although on the face of it, the letter it is unclear whether it reaches the threshold for the condition of supporting material for an Indian medical visa required by the Indian government, it is certainly more comprehensive than that provided by the Australian government to date, and it will arguably make the situation pertaining to the nationality of the child in the UK clearer to the Indian government.

7 Judicial decision-making on the rights of the child in selected reported ICS case law

The above analysis of the various approaches taken across three ICS demand state jurisdictions utilising quasi-policy measures demonstrates the efforts that some states are dedicating to create some level of clarity and certainty as to how they will deal with ICS cases involving their nationals or residents. On the whole these approaches, whilst placing differing levels of attention on

issues pertaining to the rights of the child in ICS, do not yet demonstrate a comprehensive focus on the rights of the child and measures for protection of the child in ICS situations. The New Zealand International Surrogacy Information Sheet (including Non-binding guidelines) currently appears to go the furthest towards taking a child-centred perspective to international surrogacy. In all three national jurisdictions (to a greater extent in some than others), a regulation gap exists in national law and policy with regard to ICS. It seems unlikely that this will be filled whilst an international agreement on international surrogacy is under consideration (see Permanent Bureau of the Hague Conference on Private International Law, Parentage/Surrogacy Project, http://www.hcch.net/index_en.php?act=text.display&tid=178). In the meantime, applications regarding international surrogacy – including ICS – continue to be heard before family courts in all three jurisdictions; as Table 1 illustrates, this trend shows no sign of abating. In the absence of both comprehensive international regulation and clear and harmonious state legislation and policy on ICS, the courts are playing a crucial role in exercising residual protection for the rights of the child in ICS situations.

The ethics and economics of ICS can be distracting and to some extent, irrelevant for courts to consider in reaching decisions related to applications arising out of international surrogacy situations. Whilst ethical and economic considerations provide helpful context for developing judicial reasoning, and indeed, in the area of commodification, useful guidance and frameworks to view ICS through, Henaghan astutely observes that:

> 'In these cases international Family Court Judges need to have the courage to put the overriding principle in family law, namely the welfare and best interests of the child, before the politics of the morality and legality of international surrogacy.' (Henaghan, 2013: 21).

However, the human rights framework is of crucial importance to judicial decision-making related to international surrogacy situations, given the protection standards and norms that it sets down and the international obligations it places on states in regard to the rights of the child. Therefore, in reaching decisions regarding ICS and international surrogacy situations, to what extent are the courts in Australia, New Zealand and the United Kingdom taking an approach that is focused primarily on the rights of the child as identified in this paper as being critical to realising the child's best interests in ICS? The tables below, and associated commentary, seek to provide a brief overview of this, and to highlight gaps where the international human rights framework can be better harnessed in future to ensure protection for the child. For further fact-specific discussion of some of the cases falling within this sample, see Harland, 2013, and Henaghan, 2013.

In terms of the particular child rights issues of central importance in ICS and international surrogacy situations, and therefore important for courts to consider when making a determination in relation to grant of parentage,

parenting or adoption orders, Table 2 below highlights that the courts in all three jurisdictions have been strongly concerned with consideration of the child's best interests and welfare. This demonstrates a high level of application of the best interests of the child as one of the five "principles" of the CRC. Connected to issues of welfare, decisions across the three jurisdictions are also strong on consideration of the child's right to grow up in a family environment. Finally, in relation to the preservation of the child's right to identity, the Australian and United Kingdom courts are particularly conscious of this issue in international surrogacy, as reflected in judgments to date, whilst the New Zealand courts have given less consideration to this issue. However, given the critical importance of this right for children in international surrogacy situations, it would be a positive step for courts to include this as a mandatory consideration when exercising decision-making powers in applications concerning international surrogacy.

Table 2: Frequency of reference to selected child rights issues in international surrogacy related judgements, per jurisdiction, 2008-2014 (based on all decisions lodged on relevant legal databases up to and including 28 February 2014)

Child rights issues considered in judgment	*Of 31 total decisions, number of judgments referring to issue since 2014*		
	Australia (11 judgments)	*New Zealand (7 judgments)*	*United Kingdom (13 judgments)*
Best interests of the child/welfare	10	7	10
Family environment	11	7	11
Identity (including genetic and cultural heritage)	9	4	9

Table 3 below highlights that courts across the three jurisdictions give very limited explicit weight to the CRC, by way of specific inclusion of reference to the Convention or relevant provisions. Including explicit reference to the Convention would arguably assist in highlighting the importance of the rights of the child and the international legal framework that exists to support, facilitate and protect the rights of the child in international surrogacy situations. Explicit reference to the Convention can serve to assist in strengthening the legal reasoning of judgments in relation to the rights of the child, and aid in bringing a human rights lens to the situation of the child, to deal with the child's individual situation in a more holistic way, with consideration to their upbringing and the possible impacts later in life of their current situation and

circumstances of birth. However, judges may feel that explicit reference to the Convention is unnecessary if the relevant rights-related issues are covered through the use of other language (for example, the Australian judgments are relatively strong on the inclusion of the rights as captured in Table 2 above, yet only one judgment refers explicitly to the CRC), or there may be other reasons for this lack of inclusion, which are not immediately apparent, but which may be interesting to explore further with members of the judiciary.

Table 3: Instances of explicit reference to the UN Convention on the Rights of the Child in international surrogacy related judgments, 2008-2014 (based on all decisions lodged on relevant legal databases up to and including 28 February 2014)

Of 31 total decisions, number of judgments where explicit reference to "UN Convention on the Rights of the Child" made, 2008-2014		
Australia (11 judgments)	*New Zealand (7 judgments)*	*United Kingdom (13 judgments)*
1	4	0

As discussed earlier in this paper, given the child's inability to put forward their own views in ICS applications coming before national courts and that they lack agency due to their infancy, and due to the potentially clashing rights of the child and other parties involved, it is very important for the child to be independently represented by a trained third party before decision-making bodies that will determine key aspects of the child's future. A lawyer for the child or counsel to assist the court can usefully fill this role. However, Table 4 below highlights that in Australia and the United Kingdom, such representation is the exception not the rule, which is concerning, given the limitations this places on the courts' ability to hear arguments around the best interests and rights of the child. Positively, the New Zealand Family Court appears to be more conscious of the important role to be played by such legal counsel, with over 50% of cases having involved such a representative in relation to the rights and best interests of the child. The divergence between the courts in the three jurisdictions in this respect provides a potential opportunity for the New Zealand Family Court to share best practice with its counterparts in Australia and the UK and to highlight the value of involving such counsel to ensure the child's rights and best interests are appropriately considered. Moreover, it would be interesting to examine whether this aligns with a broader trend in approaches in wider family court matters in each jurisdiction, in relation to the involvement of counsel presenting arguments focusing on the child's position.

Table 4: Instances of decisions relating to international surrogacy where the child's interests represented by lawyer for the child or counsel to assist the court, 2008-2014 (based on all decisions lodged on relevant legal databases up to and including 28 February 2014)

Of 31 total decisions relating to international surrogacy, number of judgments where child's interests represented by lawyer for child or counsel to assist the court, 2008-2014		
Australia (11 judgments)	*New Zealand (7 judgments)*	*United Kingdom (13 judgments)*
2	5	5

Arguably, the above discussion in relation to specific child rights related aspects of judicial decision making in international surrogacy cases to date in Australia, New Zealand and the UK paints a concerning picture. However, to say that this is the whole picture would be inaccurate. The body of jurisprudence across these three jurisdictions to date highlights courts grappling with the novel and complex issues of international surrogacy, with judges placed in the extremely difficult position of considering the situation of children who have been born through highly complicated circumstances, in a different state, yet are before the court and essentially needing to "take children as it finds them" in order to reach decisions (*Ellison*, 2012: at [87]). Yet this is not to say that the contextual background to the child's situation should not have a bearing on judicial decision-making in these kinds of cases. It is highly relevant, and where courts encourage inquires into such matters to be made, the child's rights may be further upheld and able to be enjoyed by the child. Furthermore, the courts in all three jurisdictions have begun to engage with the rights of the child set out by the CRC which are of particular importance in international surrogacy. There is definitely room for development here, with a greater level of consideration and incorporation of reasoning based on the CRC framework of rights and principles highly likely to benefit the children whose situations receive consideration by the courts. In this respect, any efforts by national courts dealing with international surrogacy cases to embrace and apply the "protective shadow" that the CRC casts over children (*Ellison*, 2012: at [84]), through approaches such as human rights reasoning based on the Convention, and the appointment of legal counsel for the child, is to be strongly encouraged and commended.

8 Conclusion: Placing the Child's Rights and Best Interests at the Heart of International Commercial Surrogacy

This paper has highlighted the impact of the growth of conception cross-border and explored the clash of rights that is often difficult to avoid. It has covered some of the ethical and economic considerations of ICS, and put forward the

proposition that the child is the most vulnerable person in ICS situations, with attention needing to be paid to how their rights under the international human rights legal framework are dealt with. The ethical discussion of ICS presented in this paper – explored in the light of the economic realities of ICS – emphasises that the quandary of ICS in relation to children is the value that is accorded to them and the protection that attaches as a result. The discussion demonstrates that simply because there is a commercial element to a transaction does not automatically mean that it is a bad thing – but that the possibility of tainting something not usually commercialised through the process of commodification needs to be guarded against, even in instances of mutually advantageous trades. The somewhat difficult fact of ICS arrangements only being complete when a child is provided to commissioning parents cannot be ignored.

The international human rights law framework pertaining to the child has been shown, therefore, to be a very relevant and helpful tool for focusing on the child and ensuring their protection in ICS. Particular rights – such as those to preservation of identity, nationality, a family environment, and various social and economic rights – are most at risk for children in ICS situations, and their overall best interests in connection to these deserve more comprehensive consideration by those involved in the practice at ICS. There is scope for the "practice of rights", as relevant to the context of ICS, to grow deeper roots and for those involved with ICS at all levels to be conscious that "Exercise, respect, enjoyment and enforcement are four principal dimensions of the practice of rights." (Donnelly, 2013: 8) Professional lines of defence – from consular staff, to social workers, to policy-makers, doctors and judges – can further harness this rights framework to better protect children.

Approaches amongst Australia, New Zealand and the United Kingdom as example "demand" states in relation to ICS show the utilisation of pragmatic, quasi-policy responses seeking to deal with international surrogacy, and to draw lines in the sand around what will be condoned in the absence, in many instances, of clear legislative and policy positions ameliorating residual uncertainty. These approaches have incorporated, to some extent, a child-centred perspective, but more can be done. In the area of judicial decision-making around international surrogacy over the past five years, approaches in all three sample jurisdictions provide a hopeful start towards considering and protecting the rights of the child; especially given the complex factual scenarios arising out of international surrogacy situations sometimes light on factual evidence, and the international regulation lacuna which persists. This body of case law does demonstrate, however, that practical steps, such as the appointment of counsel representing the child, can be more frequently taken and that more rigorous analysis of the child's situation and best interests in light of their CRC rights can be incorporated in future given the value of its protective shadow over children. Future international protection – whether through a Hague convention or other methods such as bilateral agreements between states, or the introduction of standards and agreements relating to the treatment of

parties to ICS, including the child – will contemplate the ethics and economics through the course of their development, and in coming to fruition will ideally place strong focus on the rights and best interests of the child.

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6 Unconceived, Unborn, Uncertain

Is Pre-Birth Protection Necessary in International Commercial Surrogacy for Children to Exercise and Enjoy Their Rights Post-Birth?

Abstract

Certain rights of children under the UN Convention on the Rights of the Child may be negatively impacted once they are born through ICS by actions and decisions taken prior to their conception and birth. This Chapter focuses exclusively on this issue. It identifies and examines these preconception and prenatal challenges to the child's rights in ICS and contends that due to the intentional, planned nature of ICS and the involvement of multiple possible parents, steps must be taken to protect the future child's rights both preconception and prenatally in all ICS arrangements. A suggested approach to preconception and prenatal protection of the future child's rights in ICS is outlined, including three basic safeguards that can be practically implemented to ensure children born through ICS can exercise and enjoy their CRC rights. Together with the preceding chapters and the ones that follow, this Chapter ensures this study treats the rights of the child in ICS holistically, considering the ICS timeline from before birth, during the child's gestation, and following the child's birth.

Main Findings

- No international consensus exists regarding pre-birth rights protection, as reflected in domestic jurisprudence, regional human rights jurisprudence, national constitutions and international human rights law.
- However, the CRC leaves open the option of its application to the pre-birth context; jurisprudence reflects that it is possible for some protection to be afforded before birth to a future child, without conferring rights pre-birth.
- The CRC should be interpreted dynamically, in light of ICS as a current-day child rights challenge.
- Decisions and actions taken in the preconception and prenatal stages of ICS arrangements can impact on the rights of future children born through individual ICS arrangements.
- Preconception and prenatal decisions and actions taken by commissioning parents and other actors in ICS arrangements should be taken in line with an *in eventu* approach to protect the rights of potential future children, so

that such children can exercise and enjoy their full range of CRC rights, if and when they are born through ICS.
- A three-pronged set of strategic safeguards is proposed, to help ensure preconception and prenatal actions and decisions in ICS preserve the opportunity for future children to exercise and enjoy their rights. These safeguards can be practically implemented by ICS actors, despite the lack of international regulation or agreement concerning ICS as a method of family formation or of ICS.

Contextual notes

- This Chapter presents new and novel analysis in the ICS context, from a child rights perspective.
- It is highly relevant to the contemporary child rights challenges arising in ICS, given that ICS case law across many jurisdictions (both domestic and regional) continues to reflect the reality that preconception and prenatal decisions and actions taken in ICS are having significant impacts on the ability of children to exercise and enjoy their rights once born.

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1 Introduction

Human reproduction has experienced marked shifts over the past 40 years, with medical and technological advances enabling the birth of children in new ways via assisted reproductive technology (ART). International Commercial Surrogacy (ICS) is one distinct new method of family formation emerging over the past decade. Children are created through ICS to fulfil the wishes of 'commissioning parents' and brought to term by a surrogate 'mother' outside the commissioning parents' home country. Such children may be genetically related to one or both commissioning parents, to their surrogate mother or to none of these parties, instead related to third-party gamete donors (sometimes in combination with a commissioning parent). ICS blends surrogacy practice with ART methods in a cross-border setting. The supply-side practice of ICS is situated in a small number of less developed states and some states in the United States of America,[1] responding to demand from prospective parents

1 E.g. the state of California allows commercial surrogacy and grants pre-birth parentage.

predominantly from the more-developed world.[2] Aside from the involvement of a surrogate, common factors in all ICS arrangements are their international nature; the conception of children in a highly intentional, planned way; and the involvement of multiple parties with potential parentage claims over resulting children. Furthermore, at the outset, such arrangements are premised on commissioning parents' intentions to assume care for the child(ren) once born and remove them to a different state to reside.

ICS arrangements centre on children that 'will be'; as such, the practice of ICS raises questions pertaining to the protection of children's future rights during the preconception[3] and prenatal[4] stages of such arrangements. The issue of the treatment of unborn children in ICS deserves special attention from an international human rights law perspective because medical and technological advances have outstripped national laws and policies, and no international regulation of ICS currently exists.[5] Consequently, children born through ICS are sometimes born into situations of heightened vulnerability, in part due to their enjoyment of some of their rights under the United Nations Convention on the Rights of the Child (CRC) being restricted by decisions and actions taken preconception and prenatally.

This paper considers whether children require some level of human rights protection in ICS before birth, so they can exercise and enjoy the full range of CRC rights once they are born. It considers how preconception and prenatal decisions and actions impact the rights of children born through ICS. Focusing on the specific context of ICS, this paper crucially addresses a gap in scholarship regarding linkages between decisions and actions concerning children occurring before they are born and their ability to realise their CRC rights once born. Given this focus on issues arising preconception and prenatally that can impact the child's ability once born to enjoy and exercise their CRC rights, right to

2 E.g. according to some sources, as at 2014 the greatest demand per capita for ICS comes from commissioning parents in Australia. See: Cooper, M., *et al* (eds.), *Current Issues and Emerging Trends in Medical Tourism*, (Hershey: Medical Information Science Reference, 2015), 147.

3 For the purposes of the discussion in this paper, 'preconception stage' refers to the time before a child is conceived in ICS; commissioning parents may be researching, seeking advice (for example from medical professionals, legal advisors, surrogacy brokers), making decisions, and even taking actions to conceive a child through ICS (such as purchasing gametes), but conception has not yet occurred and therefore the future child is only an idea.

4 For the purposes of the discussion in this paper and given that ICS arrangements are usually ART-based, 'prenatal stage' refers to the period from which a pre-embryo exists for use in the ICS arrangement and once the foetus is in utero up until child birth.

5 The Permanent Bureau of the Hague Conference on Private International Law has appointed an Experts Group with a mandate to explore the feasibility of advancing work on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements.

life issues fall largely out of scope.[6] However, it is acknowledged that decisions and actions sometimes occur in ICS leading to children not being born. Despite being outside the scope of this paper, these do raise significant human rights issues from a child rights perspective.[7]

A main feature of ICS is its intentional, planned nature as a method of creating a child. Unlike intercountry adoption – a practice with its roots in providing pre-existing children in need of care and protection with a family environment across borders – ICS is a method of family-building centred on creating new children across borders to meet the desire and demand of commissioning parents. The fact that ICS also involves multiple parties and occurs across borders makes it the most complex, risky method of having a child. Therefore, this paper proceeds from the hypothesis that due to the intentional, planned nature of ICS, the involvement of multiple possible parents and the potential impact of preconception and prenatal decisions and actions on the rights of children born through ICS arrangements, preconception and prenatal protection of the unborn future child is required in all ICS situations.

To explore this hypothesis, firstly the potential impact of decisions and actions taken during the preconception and prenatal stages on the CRC rights of children who are born through ICS are highlighted. This provides a snapshot of the problem to be addressed. This is followed by analysis of whether international human rights law provides a basis for protecting the unborn child, and selected regional human rights jurisprudence and domestic approaches concerning protection of the unborn (non-ICS) child are analysed. Following this, the intentional, planned nature of ICS and the associated responsibilities of the actors involved in ICS are discussed. Based on the foregoing discussion, focus shifts to the areas in which protection is required preconception and prenatally in ICS to ensure that particular CRC rights are not an empty promise for children born through ICS, but rather that they can exercise and enjoy their CRC rights from birth. Informed throughout by a public international law child rights framework, this paper concludes by recommending particular preconception and prenatal protective safeguards for the rights of future children in ICS, highlighting the roles and obligations of various parties in this highly contentious area of children's rights.

6 Given that in instances where the child does not end up being born as a result of an ICS arrangement, their enjoyment and exercise of rights becomes moot point in the context of the focus of this paper.

7 The child rights issues arising from decisions and actions in ICS arrangements leading to children not being born e.g. as a result of multiple embryo transfer and subsequent foetal reduction, sex selection or abortion on other non-medically necessary grounds merit separate future research, centring on issues raised under Articles 2 (non-discrimination) and 6 CRC (right to life, survival and development).

2 The impact of actions and decisions in the prenatal and preconception stages of ICS on the rights of children once born

In ICS, preconception and prenatal decisions and actions can trigger implications for the child's enjoyment and exercise of their CRC rights once born. Figure 1 below provides a snapshot of the core rights of the child that can be impacted negatively by problems arising during the prenatal and preconception stages of ICS. As illustrated, these cluster around issues relating to the child's identity and their protection and participation rights. These core rights at risk are discussed further below in the contexts of the preconception and prenatal stages of ICS, highlighting some of the ways these rights impacts are triggered by actions and decisions before the child is even born.

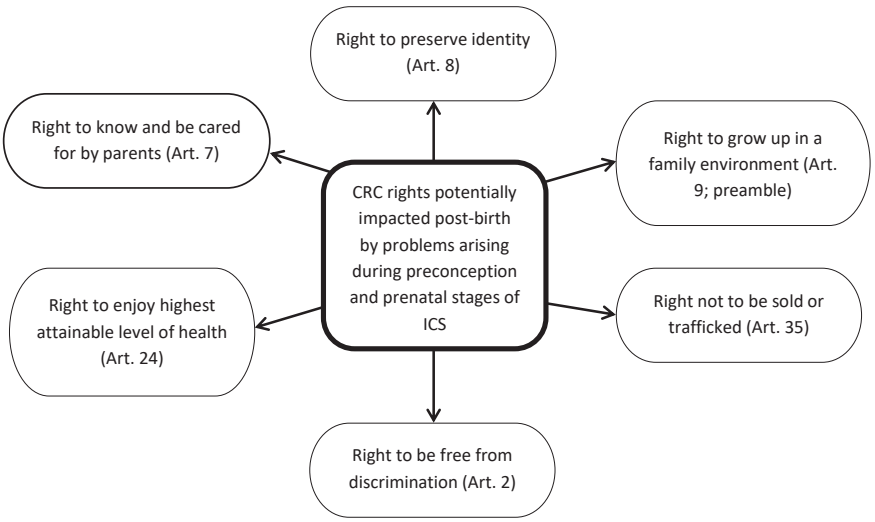

Figure 1

2.1 Key child rights impacts triggered during the preconception stage of ICS

During the preconception stage of ICS, the future child is only an abstract thought, desired by the commissioning parents. Therefore, to start thinking about the future child's rights can appear to stretch the concept of human rights. However, in the ICS context, it is necessary to do so given the reality that decisions and actions taken before conception can have a clear and significant impact on the child's enjoyment and exercise of their rights from birth onwards. Regarding some CRC rights, if they are not given forethought and some protection before birth, they will be rendered meaningless for the child once born. Decisions made by commissioning parents to use anonymous

gametes to conceive a child in ICS, and/or an anonymous surrogate mother to bring the child to term are preconception decisions with far-reaching impacts on the future child's rights. Most significantly, these decisions can trigger severe restrictions on the child's Article 8 CRC right to preserve their identity once they are born. In ICS arrangements using anonymous gametes, the child will not be able to preserve their genetic identity and will be unable to know their genetic parents, raising an additional breach of their right to know their parents under Article 7 of the CRC. When anonymous surrogates are involved in ICS, this has a similar impact on the child's Article 7 and 8 rights, except in relation to the biological aspect of the child's identity (and therefore, their ability to know the person who carried them to term and gave birth to them).

In instances where the child is born through ICS using anonymous gametes, an associated implication of being unable to preserve the genetic element of their identity is that the child will not be able to access health history information relating to their genetic parents. This may mean the child remains unaware of their risk of developing medical conditions or diseases detectable through genetic health history, and they will remain unable to take preventative measures relating to such conditions and diseases. This prevents the child from full enjoyment of their Article 24 right to the highest attainable standard of health. This may also be the case from a biological perspective regarding the child's surrogate mother, in instances where she remains anonymous. The negative impacts of these preconception decisions and actions on the child's Articles 7, 8 and 24 rights will have a lifetime impact on the child once born, and will be inconsistent with the child's right under Article 3 CRC to have their best interests treated as a primary consideration in all actions concerning them and the principle that all CRC rights must be implemented consistent with the best interests principle.[8]

The use of incorrect gametes or embryo is a further problematic situation which can arise during the preconception stage of ICS, triggering impacts on the child's rights once born. This can occur when the gametes or embryo intended by the commissioning parents for use in the ICS arrangement are mixed-up with those intended for use in a different ICS or ART arrangement, leading to a child being born with a genetic makeup different to that intended. In ICS arrangements where this occurs and the future child was intended to have a genetic link to one or two of their commissioning parents, this will mean the child is born without such a link. In mix-up situations where the child's genetic parents are unable to be traced, this will lead to a breach of the child's Article 8 identity right, their Article 7 right to know their parents (regarding genetic parents), and in turn, their Article 24 right. Furthermore, when incorrect gametes or embryo are used in ICS and it is established that

8 Committee on the Rights of the Child, *General Comment No. 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration*, UN Doc. CRC/C/GC/14 (29 May 2013), [1].

the child is not of the genetic make-up intended, this raises the potential of commissioning parents abandoning the child following his or her birth. If this occurs, this will arguably breach the non-discrimination principle (Article 2 CRC); the child's right to grow up in a family environment (established by Article 9 CRC and in the CRC preamble) may also be at risk; and the abandoned child may be at risk of child trafficking or sale, which is prohibited under Article 35 CRC.

2.2 Key child rights impacts triggered during the prenatal stage of ICS

Once the child is in-utero, many actions and decisions may be taken by parties to and involved with an ICS arrangement leading to negative impacts on the future child's rights once born. The child's enjoyment and exercise of their CRC rights under articles 2, 7, 8, 9, 24 and 35 will potentially be impacted by the decisions and actions occurring in each of the following scenarios which may arise during the prenatal stage of ICS:

- A multiple pregnancy occurs and commissioning parents decide they will not take one (or more) of the future children in the event they are born.
- Prenatal testing detects the unborn child does not fulfil the particular intent of the commissioning parents (for example, a different sex to that intended; disability or serious health condition), and as a result commissioning parents decide to abandon the ICS arrangement while the child is in-utero or once the child is born.
- A decision is made by commissioning parents and/or the surrogate to not prenatally screen for disabilities and serious health conditions, and upon birth, a disability or serious health condition is detected; the commissioning parents abandon the child as a result.
- The surrogate and commissioning parents disagree regarding the surrogate's control/autonomy over health and lifestyle decisions during pregnancy, leading to commissioning parents reneging on the ICS arrangement and abandoning the child before or after birth.
- Commissioning parents decide to renege on the ICS arrangement for any other reason before or after birth, and in doing so, abandon the child.

One further problematic situation which can arise during the prenatal stage of ICS is the surrogate reneging on the ICS arrangement and deciding during pregnancy that she wants to keep the child or children once born. This raises potential implications for the child's enjoyment and exercise of their rights under Articles 7, 8 and 24 once born, if the child is unable to know their commissioning parents and their genetic parents.

Three factors often determine if the preconception and prenatal problems highlighted in the above sections arise in an ICS arrangement: the intent and preparedness of the commissioning parent(s) regarding the ICS arrangement;

the surrogate mother's wishes and control over her reproductive autonomy; and the nature of the agreement between the parties. However, it is essential to introduce the rights and best interests of the future child as another determining factor during the preconception and prenatal stages of every ICS arrangement. This is crucial given the future child's centrality to all such arrangements and their vulnerability regarding their rights and status due to being conceived and born through ICS.

3 Does international human rights law provide a basis for protecting the unborn child?

Having outlined the significant challenges to child rights in ICS triggered by actions and decisions taking place before the child is conceived and born, it is necessary to consider whether international human rights law provides a basis for protecting unborn future children in ICS. This section primarily focuses on whether unborn children have rights under the CRC, before briefly considering other international human rights law instruments.

3.1 United Nations Convention on the Rights of the Child

None of the CRC's operative clauses explicitly address whether unborn children have rights. Article 1, defining 'child' is silent on this; Nolan notes "this 'silence' of the CRC reflects the absence of a universally agreed-upon age when childhood begins" (Nolan, 2011, 3); and as Cornock and Montgomery note, "Given the controversy of deciding when life begins […] this deliberate lack of definition is not surprising. […] to gain the maximum number of ratifications, such a contentious issue was always likely to be deliberately obscured in the drafting process." (Cornock and Montgomery, 2011, 11) The CRC's lack of a definition regarding the start of childhood leaves open the option of interpreting the CRC as extending to the unborn child; Dorscheidt asserts given Article 1 "does not mention a minimum age limit, it remains possible that the Convention also includes the unborn child." (Dorscheidt, 1999, 309) Janoff elaborates that "The Article 1 definition allows for several interpretations of when childhood might begin under the Convention: at fertilisation, at conception, at birth, or at some other point between conception and birth." (Janoff, 2004, 164)

The CRC preamble includes some guidance regarding the CRC's application pre-birth. Preambular paragraph nine includes a statement referencing the prenatal child, using wording directly lifted from the Declaration of the Rights of the Child (1924): "Bearing in mind that, as indicated in the Declaration of the Rights of the Child […] the child, by reason of his physical and mental

immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". Interpreting preambular paragraph nine consistent with Article 31, Vienna Convention on the Law of Treaties (VCLT),[9] it appears the special protection afforded to children applies before and after birth; the preamble's wording relating to the unborn child is unambiguous, providing an arguable basis for interpreting the CRC as providing that some prenatal protection of the unborn child is necessary. This is despite there being no explicit mandatory requirement of pre-birth protection in preambular paragraph nine or anywhere else in the CRC. Interpreted in light of the object and purpose of the CRC – which broadly speaking is the establishment of standards and norms on the protection, participation and promotion of the rights of the child – this meaning also holds.

However, in the context of the wider CRC text, it is necessary to analyse the extent to which preambular paragraph nine can be relied on as establishing a position at international law that rights should be protected pre-birth. This is especially so given the lack of further explicit mention of 'before birth' in the CRC's operative provisions. Articles 6 and 24 are the only operative CRC provisions which can be read as explicitly connecting to "before birth". Article 6 recognises the child's inherent right to life and that the child's survival and development will be protected to the maximum extent possible by States Parties. But as Dorscheidt notes, as with Article 1, Article 6(1) "does not indicate at what point life begins and because of this it is unclear at what moment the enjoyment of the inherent right to life starts." (Dorscheidt, 1999, 311)

In establishing the child's right to the enjoyment of the highest attainable standard of health, Article 24 requires States Parties (in pursuing full implementation of this right) to, among other things, take appropriate measures to diminish infant and child mortality (Art. 24(2)(b)) and to ensure appropriate prenatal health care for mothers (Art. 24(2)(d)). As Grover posits, the inclusion of these provisions indicate that "the *child's* right to health encompasses also the right to proper care prior to birth". (Grover, 2015, 128). Kilty, arguing in favour of children knowing the identities of their genetic parents given the associated health benefits of knowing about health conditions and diseases they may be genetic carriers of or pre-disposed to, says "one may only decide to make lifestyle changes when one knows they are required. Information about one's predisposition to suffer genetic health problems is easier to obtain when one knows the identities of one's genetic parents. For this reason, children who have been misled or denied information about their genetic parents, [as a result of the circumstances of their birth] lack information about their genetic

9 Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) 1969 requires that treaties are interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

health history and, as a result, are at risk of having their welfare choices compromised." (Kilty, 2013, 5)

Furthermore, Articles 7 and 8 of the CRC have an implied connection to the "before birth" reference in preambular paragraph nine. Article 7(1) establishes the child's right to know and be cared for by his or her parents as far as possible, and Article 8(1) stipulates the child's right to preserve his or her identity. The object and purpose of these provisions is arguably to ensure that the child can know their parents and understand where they came from, and have the opportunity to be able to answer the fundamental human question, 'who am I?' (Achmad, 2016). In the ICS context, such provisions only become meaningfully operative if decisions and actions occurring during the preconception and prenatal stages are consistent with these rights, protecting them for the future child. If not, the child may experience difficulties exercising and enjoying their Article 7 and 8 rights once born. For example, these rights become meaningless in ICS situations where donor gametes are used, if there is no obligation at the preconception stage to safeguard and preserve donors' identity information. If such steps are not taken before the child is born to protect their future rights under Articles 7 and 8, once born, the child will never be able to know their genetic identity and genetic parents, therefore unable to exercise and enjoy these CRC rights.

Article 31(1) VCLT states that 'context' for the purpose of interpretation of treaties comprises, "in addition to the text, including its preamble and annexes", among other things "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" (Article 31(2)(a) VCLT). Regarding the CRC, O'Rourke asserts "The preamble counts. It gives context, weight and importance to what follows. It established the framework, values and aspirations of those who framed the document." (O'Rourke, 2012, 4) Alston tempers this view, stating that the preamble does not have obligatory force in its own right (Alston, 1990, 169), a view confirmed by the International Court of Justice that alone, preambular provisions do not generally amount to rules of law (*South-West Africa Cases (Second Phase)* ICJ Rep. 1966, at [50]). Regarding other agreements made between all parties connected with the conclusion of the CRC, it is notable that the Open-Ended Working Group (O-EWG) drafting the CRC adopted the following interpretative statement regarding inclusion of the ninth preambular paragraph: "In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by States Parties."[10] Consequently, the door was left open to interpretations extending CRC protection pre-birth, despite the Convention itself not requiring it. Given this possibility, a small number of States Parties

10 Commission on Human Rights, *Report of the Working Group on a draft convention on the rights of the child*, (2 March 1989), E/CN.4/1989/48, [43]-[47].

have lodged reservations or declarations regarding the CRC's application to pre-birth issues.[11]

3.1.1 Convention the Rights of the Child – Travaux Préparatoires

The *travaux préparatoires* provide further insight regarding the weight to be accorded to preambular paragraph nine when interpreting the CRC.[12] During negotiation of the CRC, the issue of whether rights should accord before and after birth divided the states involved (Detrick, 1992, 26); even amongst those states arguing for rights before birth, there was disagreement over the exact point at which such protection should commence.[13]

However, as Detrick outlines, this did not prevent some level of agreement being reached:

> '… there was just one relevant point on which all could agree: that, as stated in the Preamble of the 1959 Declaration on the Rights of the Child, the child "needs special safeguards and care, including appropriate legal protection, both before as well as after birth." Such legal protection could include, but would not require, the prohibition of abortion. Not without difficulty, the Working Group finally came to a consensus that explicit reference to the formulation in the Declaration would be made in the Preamble to the Convention, and that there would be no mention of minimum age in Article 1.' (Detrick, 1992, 26)

Despite the wording of preambular paragraph nine, Copelon argues that "This reflects, at most, recognition of a state's duty to promote, through nutrition, health and support directed to the pregnant woman, a child's capacity to survive and thrive after birth" (Copelon, 2005, 122), and asserting that the limited purpose of the words 'before as well as after birth' is reinforced by the O-WEG's statement regarding interpretation (Copelon, 2005, 122). However, the fact remains that the possibility of pre-birth protection is in no way ruled

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11 Argentina and Guatemala declare an interpretation of Article 1 CRC as applying to human beings from the moment of conception; the Holy See declares it recognises the CRC as safeguarding the child's rights before birth, moreover stating that preambular paragraph nine is the "perspective through which the rest of the Convention will be interpreted." Conversely, China and the United Kingdom's declarations state that they interpret the CRC as only applying following a live birth. See: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (accessed 28 June 2016).

12 Art 32 VCLT states that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or reasonable."

13 E.g. Portugal favoured clear definition of the rights of the child applying before birth (Detrick, S., 1992, 49); Malta and Senegal were more specific, seeking protection of the child's rights to begin from conception (a proposal the Holy See would have supported if it had not been withdrawn) (Detrick, S., 1992, 118).

out by the final CRC text. In the context of ICS, Copelon's framing of States Parties' duties does not go far enough to protect the child's wider rights under the CRC; without active protection of the future child's rights before birth and conception by both States Parties and other actors in ICS (such as commissioning parents and medical professionals), a number of their rights (as already discussed) are at risk of not being able to be enjoyed and exercised once born. Copelon's position is also inconsistent with the Committee on the Rights of the Child's long-standing position of requiring States Parties to ensure children born through ART can know their origins,[14] which necessarily requires actions to be taken preconception to protect the future child's identity rights so they are realisable by children in the event they are born.

Given this paper's focus on ICS, it is significant to note that many O-EWG delegations supported including a CRC article governing medical experimentation in the ART context (Alston, 1990, 166). Although no such provision appears in the final text, one idea discussed was a provision that "would have extended any protection accorded to children in general to "the conceived, unborn child" who would have been protected from "genetic experiments and manipulations injurious this physical, moral or mental integrity or to his health." (Alston, 1990, 166) However, applying this idea of post-conception, prenatal protection to the ICS context, it would not go far enough to protect the child's rights in situations already identified as arising preconception, negatively impacting the child's exercise and enjoyment of rights once born. Despite this, the CRC framers' consideration of pre-birth protection in the ART context indicates that some protection pre-birth is important in the overall child rights rubric. The fact this was considered over 25 years ago indicates the urgency for the CRC to now be interpreted in an evolutive and dynamic way[15] in light of contemporary developments such as ICS, as a living instrument (McGonagle and Donders, 2015, 153) to ensure children's rights are protected in such contexts.

On balance, the CRC text reflects compromises on pre-birth protection to achieve a position acceptable to all states. It achieves this through including preambular paragraph nine, therefore leaving open the option of prenatal rights protection; consequently, "The Convention is neutral in neither requiring nor forbidding formal legal protection of the fetus." (Hodgson, 1994, 375) Dorscheidt argues, therefore, that states parties to international human rights treaties

> 'are at liberty to hold whatever view on the unborn child's legal position they consider appropriate. Generally, States Parties give substance to this liberty by

14 E.g. see Committee on the Rights of the Child, *Concluding observations regarding Norway*, (25 April 1994), CRC/C/15/Add.23, [10]. However, to date the Committee has not invoked premabular paragraph nine to support its positon.

15 Committee on the Rights of the Child, *General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, UN. Doc. CRC/C/GC/8 (7 March 2007), [18].

> holding the view that the unborn child derives no legal protection from these human rights instruments. It is my impression, however, that this prevailing view has emerged from the fact that during the drafting of many human rights treaties the legal position of the unborn child was exclusively considered in relation to abortion. Other prenatal matters were hardly discussed, probably because they were not identified yet, or simply not familiar to the States' delegates. Meanwhile, there is much evidence to the fact that the legal position of the unborn child is not a one-item issue and needs further elaboration in many other contexts as well.' (Dorscheidt, 2010, 453)

Taking up Dorscheidt's call, ICS should be treated as one of these 'other prenatal matters'; by elaborating on the CRC's application to the child's situation both preconception and prenatally in ICS, this paper adds to the body of scholarship on the possibility of rights protection before birth under international human rights law.

3.1.2 Other international human rights law instruments

There is no explicit mention of pre-birth rights in the UDHR, ICCPR or the International Covenant on Economic, Social and Cultural Rights (ICESCR). Nor are prenatal rights addressed by the Universal Declaration on Bioethics and Human Rights. However, both the UDHR and the ICCPR establish the right to life (Articles 3 and (1) respectively), and the ICCPR explicitly prohibits carrying out the death penalty on pregnant women (Article 6(5)). The ICESCR states that "special protection should be accorded to mothers during a reasonable period before and after childbirth" (Article 10(2)), and that States Parties should take steps necessary for "the provision for the reduction of the stillbirth-rate and infant mortality and for the healthy development of the child" (Article 12(2)(a)). Beyond these provisions and the CRC as already discussed, there is little guidance to be gleaned from international human rights law instruments regarding how to approach the future child's rights pre-birth.

Moreover, pre-birth issues have received scant attention in the general comments of treaty bodies,[16] and the Human Rights Committee ('the HRC', receiving communications under the ICCPR) has dealt with very few cases

16 Of the few instances existing are the Human Rights Committee's observation of the "high incidence of prenatal sex selection and abortion of female foetuses" in its General Comment No. 28 on Equality, and its statement in its General Comment No. 6 that "The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy" (para. 5).

concerning the situation of the child pre-birth.[17] However, notably the Human Rights Committee recently published a new draft General Comment on Article 6: Right to life,[18] including a number of statements regarding the pre-birth phase, for example emphasising "the Covenant does not explicitly refer to the rights of unborn children" ([7]) and asserting that "This omission is deliberate, since proposals to include the right to life of the unborn within the scope of article 6 were considered and rejected during the process of drafting the Covenant." ([7]fn9) The Committee elaborates that

> 'In the absence of subsequent agreements regarding the inclusion of the rights of the unborn within Article 6 and in the absence of uniform State practice which establishes such subsequent agreements, the Committee cannot assume that Article 6 imposes on State parties an obligation to recognize the right to life of unborn children. Still, States parties may choose to adopt measures designed to protect the life, potential for human life or dignity of unborn children, including through recognition of their capacity to exercise the right the life [sic], provided that such recognition does not result in violation of other rights under the Covenant, including the right to life of pregnant mothers and the prohibition against exposing them to cruel, inhuman and degrading treatment or punishment.' ([7])

This statement aligns with the practice of the Committee on the Rights of the Child regarding pre-birth issues, in which it has acknowledged the need for some protection of the unborn child's rights (for example regarding their right to know their origins and the recommendation that States Parties "introduce and strengthen prenatal care"[19] for children with disabilities), expressed disapproval of practices such as abortion as a form of birth control,[20] "discrim-

17 A communication made to the Human Rights Committee concerning the situation of unborn children in the context of abortion in general in Canada was decided as being inadmissible for consideration by the Committee. (Communication No. 1379/2005 CCPR/C/84/D/1379/2005). Of those communications concerning pre-birth issues the Committee has considered on their merits have been communications concerning, e.g., the situation of a rape victim who was refused an abortion (Communication No. 1608/2007 CCPR/C/101/D/1608/2007) and the refusal of a therapeutic abortion for a pregnant adolescent despite medical opinions that her life was in danger as a result of the continued pregnancy (Communication No. 1153/2003 CCPR/C/85/D/1153/2003).

18 Human Rights Committee, *Draft General Comment No. 36 Article 6: Right to Life,* UN Doc. CCPR/C/GC/R.3 (1 April 2015).

19 Committee on the Rights of the Child, *General Comment No. 9: The Rights of Children with Disabilities*, UN Doc. CRC/C/GC/9, (27 February 2007), [53].

20 E.g. Committee on the Rights of the Child, *Concluding Observations: Greece*, UN Doc. CRC/C/15/Add.170 (2 April 2002), [60]; Committee on the Rights of the Child, *Concluding Observations*: *Russian Federation*, UN Doc. CRC/C/15/Add. 110, (10 November 1999), [46]; Committee on the Rights of the Child, *Concluding Observations*: *Latvia*, UN Doc. CRC/C/ LVA/CO/2, (28 June 2006), [44].

inatory elimination of girls before birth"[21] and sex-selection,[22] but also made clear its view that in situations where the physical or mental health and well-being of a pregnant woman is at risk, her rights must be given precedence over the unborn child's right to life.[23] The draft statement of the Human Rights Committee also reinforces the CRC's position of leaving open the option for States Parties to choose whether to actively protect the child pre-birth.

The Human Rights Committee explicitly clarifies in this draft General Comment that "the Covenant does not directly regulate questions relating to the right to life of frozen embryos, eggs or sperms, stem cells or human clones. States parties may regulate the protection of these forms of life or potential life, while respecting their other obligations under the Covenant." ([8]) However, the Committee also states that the special protection provided by the prohibition in Article 6(5) ICCPR on carrying out the death sentence on pregnant women "stems from an interest in protecting the rights and interests of affected family members, including the unborn foetus and the foetus's father." ([50]) By making clear the position at international human rights law that although not required absolutely, some level of pre-birth protection is important in some contexts and certainly possible, this draft statement of interpretation is progressive given its acknowledgement that there is an interest in protecting the rights and interests of the unborn foetus.

3.2 Treatment of the unborn child in regional human rights instruments and national constitutions

3.2.1 Regional human rights instruments

Regional human rights instruments focus on pre-birth issues through provisions protecting the right to life. The right to life as established by the ICCPR is reflected in the African Charter on Human and People's Rights, the African Child Welfare Charter and the European Convention on the Protection of

21 Committee on the Rights of the Child, *General Comment No. 13: The right of the child to freedom from all forms of violence,* UN Doc. CRC/C/GC/13, (18 April 2011), [16]: "The social costs arising from a demographic imbalance due to the discriminatory elimination of girls before birth are high and have potential implications for increased violence against girls including abduction, early and forced marriage, trafficking for sexual purposes and sexual violence". The Committee also notes at para 11(i) of General comment 7 early childhood that "Discrimination against girl children is a serious violation of rights. […] They may be victims of selective abortion..."

22 E.g. Committee on the Rights of the Child, Concluding Observations: China, UN Doc. CRC/C/CHN/CO/2, (24 November 2005), [28]-[29].

23 E.g. Committee on the Rights of the Child, *Concluding Observations: Chad*, UN Doc. CRC/C/15/Add.107, (24 August 1999), [30]. Janoff argues this indicates a developing international norm that the rights of pregnant mothers supersede the unborn child's right to life. (Janoff, 2004, 165)

Human Rights and Fundamental Freedoms, but none of these key regional human rights instruments mention pre-birth rights. However, the American Convention on Human Rights (ACHR) takes a different approach; as Schabas notes, "the majority of Member States felt that the life of the unborn should be protected" (Schabas, 2008, 1059). Therefore, Article 4(1) ACHR says the right to life "shall be protected by law and, in general, from the moment of conception." This provision remains unique within international law.

In the European context, the European Convention on Human Rights and Biomedicine (Oviedo Convention) provides some guidance relating to the preconception and prenatal stages. Although the Oviedo Convention focuses on the 'human being' and (as per its preamble) is aimed at respect for the human being and ensuring human dignity, it does not define 'human being', and some of its provisions indicate limited prenatal protection should be afforded to organisms with potential to develop into human beings. For example, Article 12 restricts the use of predictive genetic tests to health purposes or scientific research linked to health purposes. Article 14 prohibits the practice of sex selection and refers to the 'future child', requiring that "The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided." Article 21 of the Ovideo Convention is also explicit that "The human body and its parts shall not, as such, give rise to financial gain". Relevant to the preconception stage, Article 18(1) states that "Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo."[24]

3.2.2 *National constitutions*[25]

A small number of states take a constitutional approach to the issue of whether the child receives protection pre-birth. Some constitutions protect unborn

24 The Oviedo Convention does not define what amounts to 'adequate protection of the embryo'; however, the Council of Europe's Working Party on the Protection of the Human Embryo and Foetus stated in its *Report on the Protection of the Human Embryo In Vitro* said that "Even if positions differ on the status of the embryo and the creation of embryos *in vitro,* there is general agreement on the need for protection. Measures taken to ensure that protection and the level of protection may however vary […] measures provided usually offer protection of the embryo *in vitro* from the fertilisation stage onwards. The aim in general is to ensure optimal conditions for fertilisation and embryo culture, and respect for good medical practice. One of the aims of protection is to ensure that the embryo is not subjected to experimental procedures that could damage it or put at risk its developmental potential." (19 June 2003, 8).

25 Initial research for this section was undertaken through keyword searches for the terms 'abort'; 'abortion'; 'child'; 'children'; 'conception'; 'foetus'; 'human'; 'life'; 'terminate'; 'termination'; 'unborn' in the national constitutions available at https://www.constituteproject.org/search?lang=en

children by prohibiting termination (Uganda;[26] Zambia;[27] Zimbabwe[28]) or by protecting the health of mothers once a child is conceived (Venezuela[29]). Others protect unborn children alongside the mother's right to life (Ireland,[30] the Philippines[31]). However, the most common approach to constitutional pre-birth protection is a statement that life or the right to life begins[32] or state protection of human life applies from conception.[33] Within this group various nuances are apparent. The Hungarian Constitution (also protecting life from the moment of conception) is the only national constitution including the term 'foetus';[34] El Salvador explicitly "recognizes as a human person every human being since the moment of conception";[35] whereas Madagascar frames pre-birth recognition within the right to health from conception.[36] Beyond these approaches, the Chilean Constitution uniquely protects "the life of those about to be born",[37] which Couso et al assert leaves room for regulating abortion through law (Couso, 2011, 185). Peru has a more extreme position, constitutionally recognising "the unborn child is a rights-bearing subject in all cases

26 Article 22(2), Chapter 4, Constitution of the Republic of Uganda (amended by the Constitution (amendment) (No. 2) Act, 2005): "No person has the right to terminate the life of an unborn child except as may be authorised by law."

27 Article 12(2), Part III, Constitution of Zambia (1991) "No person shall deprive an unborn child of life by termination of pregnancy except in accordance with the conditions laid down by an Act of Parliament for that purpose."

28 Article 48(2), Part 2, Chapter 4, Constitution of Zimbabwe (2013): "An Act of Parliament must protect the lives of unborn children, and that Act must provide that pregnancy may be terminated only in accordance with that law."

29 Article 76, Chapter V, Title III, Constitution of the Bolivarian Republic of Venezuela (1999) "The State guarantees overall assistance and protection for motherhood, in general, from the moment of conception".

30 Article 40(3)(3), Constitution of Ireland (last amended 29 August 2015), 1937.

31 Section 12, Article II, Constitution of the Republic of the Philippines (1987).

32 Article 4, Chapter I, Title II, Constitution of the Republic of Paraguay (as amended 2011), 1992; Article 37, Section I, Chapter I, Title II, Constitution of the Dominican Republic (2010); Article 26(2), Part 2, Chapter 4, Constitution of Kenya (2010).

33 Article 3, Constitution of the Republic of Guatemala (as amended to 1993), 1985; Article 45, Section 5, Chapter 3, Title II, Constitution of the Republic of Ecuador (2008); also similar, although not expressed constitutionally, Polish legislation states that every human being "shall have a natural life as from the time of his conception" (Section 1(1), Law of 7 January 1993 on family planning, protection of human foetuses and the conditions under which pregnancy is possible) and "The life and health of the child shall be placed under the protection of the law, as from the time of its conception." (Section 1(2), Law of 7 January 1993 on family planning, protection of human foetuses and the conditions under which pregnancy is possible)

34 Article 2, Constitution of the Republic of Hungary (2011): "Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."

35 Article 1, Title I, Constitution of the Republic of El Salvador (as amended to 2003), 1993.

36 Article 19, Title II, Sub Title II, Constitution of the Republic of Madagascar (2010): "recognises and organises for all individuals the right to the protection of health from their conception through the organisation of free public health care".

37 Article 19(1), Constitution of the Republic of Chile (as amended up to 2010), 1980.

that benefit him",[38] whilst the Honduran Constitution equates the unborn with the born (similar to El Salvador's recognition of the unborn as human persons from the moment of conception) for the purposes of all rights accorded within limits established by law.[39]

Some constitutional courts have, however, held that protection of the foetus must be balanced with the rights of the pregnant woman. For example, the Colombian Constitutional Court ruled unconstitutional a law giving complete pre-eminence to the foetus, thereby extinguishing the woman's fundamental rights and violating her dignity "by reducing her to a mere receptacle for the foetus, without rights or interests of constitutional relevance worthy of protection." (*Sentencia* C-355/06, [10.1]) Article 15 of the Slovak Constitution states that "Human life is worthy of protection even prior to birth", however the Slovak Constitutional Court held this must not be interpreted as trumping the right of a pregnant woman to exercise her rights over her personal autonomy and bodily integrity. (*PL. US 12/01 from 4 December, 2007,* [10])

The constitutional approaches highlighted above evidence in practice states' ability to choose whether and to what extent they protect unborn children, consistent with the margin left open to them by the CRC.

4 Jurisprudential approaches to pre-birth issues

This section highlights leading regional human rights jurisprudence addressing (albeit limitedly) whether human rights protection can attached pre-birth, followed by analysis of leading regional and domestic jurisprudence and statutory approaches to specific preconception and prenatal issues. These jurisprudential approaches to pre-birth issues provide further insight relevant when approaching the ICS context.

4.1 Leading regional human rights jurisprudence

The leading regional human rights jurisprudence of most relevance to the discussion in this paper comes from the Inter-American and the European Courts of Human Rights respectively; these are briefly discussed below.

4.1.1 Inter-American Court of Human Rights

In the Inter-American Court of Human Rights (I-ACHR), *Artavia Murillo et al ("In Vitro Fertilisation") v. Costa Rica* (Inter-Am. Ct. H.R. (ser. C) No. 257, No-

38 Article 2(1), Constitution of the Republic of Peru (as amended up to 2009), 1993.
39 Article 67, Constitution of the Republic of Honduras (as amended to 1991), 1982.

vember 28, 2012) is the leading case on this issue. The Court explicitly states that an embryo is not a person for the purposes of Article 4(1) of the ACHR (Inter-Am. Ct. H.R. (ser. C) No. 257, [264]) and clarifies that the protection of the right to life from 'the moment of conception' under the ACHR only has effect from the time "the embryo becomes implanted in the uterus"(therefore, Article 4 ACHR is inapplicable prior) (Inter-Am. Ct. H.R. (ser. C) No. 257, [264]). The Court adopted a gradualist view of pre-birth rights, finding "it can be concluded from the words "in general" that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible." (Inter-Am. Ct. H.R. (ser. C) No. 257, [264]) De Jesus argues the I-ACHR erred in its interpretation of Article 4(1) in *Artavia Murillo* (De Jesus, 2014, 227), asserting it has "interpreted the right to life from conception in the most restrictive possible manner, holding that, before implantation, the human embryo is not a person entitled to human rights protection under the American Convention, while redefining the term "conception" as implantation, not fertilisation." (De Jesus, 2014, 226)

Indeed, if we were to apply this ruling to ICS situations, it would mean that the rights of the child affected by actions or decisions preconception would be outside the scope of protection as defined by the Court; this would clearly have a negative impact on the rights of the child to identity preservation, and to know their parents once born (depending on the circumstances, their commissioning parents, genetic parents, and/or their surrogate mother). The I-ACHR has not dealt with another case on its merits concerning the issue of when rights attach pre-birth since *Artavia Murillo,* however De Jesus may well be correct that "It is unlikely that *Artavia* will be deemed to be the final word on the interpretation [of] the right to life from conception." (De Jesus, 2014, 248) It would certainly be useful if the Court outlines its reasoning underpinning its position further; until then, *Artavia Murillo* arguably stands as the most forthright contemporary judgment on this topic.

4.1.2 European Court of Human Rights

Despite being issued ten years ago, *Vo v. France* (App. no. 53924/00, Judgment (Merits), Court (Grand Chamber) 08/07/2004) remains the leading European Court of Human Rights (ECtHR) judgment directly concerning whether Article 2 ECHR (right to life) applies pre-birth. A medical mix-up led to a procedure being undertaken on the wrong pregnant woman (the applicant), during which an act of medical negligence occurred, leading to a therapeutic abortion being necessary to protect her health. As Wicks observes, *Vo v. France* is unusual as it does not concern a fact scenario where the interests of the pregnant woman conflict with the foetus' interests; rather, the applicant asserted her deceased unborn child's rights (Wicks, 2009, 184). As the Court said "the

dispute concerns the involuntary killing of an unborn child against the mother's wishes, causing her particular suffering. The interests of the mother and the child clearly coincided." ([87])

The Grand Chamber held Article 2 ECHR inapplicable; it said even assuming Article 2 applied, no violation of the right to life occurred. ([95]) However, of particular relevance to the issue of pre-birth protection in ICS is the ECtHR's treatment of the issue of whether ECHR protection covers the embryo or foetus. The ECtHR noted the silence of the ECHR regarding the temporal limitations of the right to life, and said it was "yet to determine the issue of the "beginning" of "everyone's right to life" within the meaning of [Article 2 ECHR] and whether the unborn child has such a right." ([75])[40] Observing no consensus exists in Europe regarding the nature and status of the embryo or foetus, the ECtHR said European states do hold a common view that the embryo/foetus belongs to the human race. ([84]) Importantly, the ECtHR asserted "The potentiality of that being and its capacity to become a person […] require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2." ([84]) Furthermore, the ECHR said the possibility that "in certain circumstances safeguards may be extended to the unborn child" ([80]) remains open. Therefore, it is possible the ECtHR will reach a view in future (on particular facts and balancing the rights of other parties involved) that human rights protection should be afforded to unborn children under the ECHR. Indeed, should an ICS situation raising such questions form the subject of an application to the ECtHR in future, the possibility of reaching such a view remains open to the Court. Judge Rozakis further asserted in his separate opinion:

> 'Even if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after its birth. This does not mean that the unborn child does not enjoy any protection by human society, since – as the relevant legislation of European States, and European agreements and relevant documents show – the unborn life is already considered to be worthy of protection. But as I read the relevant legal instruments, this protection, though afforded to a being considered worthy of it, is, as stated above, distinct from that given to a child after birth, and far narrower in scope.' (Separate opinion of Judge Rozakis, *Vo v. France,* App. no. 53924/00, Judgment (Merits), Court (Grand Chamber) 08/07/2004)

Finally regarding *Vo v. France,* the dissenting judgments are significant when considering the preconception and pre-birth situation of the rights of children in ICS. Judge Ress notes that the majority in *Vo* deviates from the prior approach of the ECtHR's case law on this issue, which has been based on the

40 Moreover, the Grand Chamber said it was not desirable or possible to "answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention." ([85])

in eventu or "assuming that" argument. (Dissenting opinion of Judge Ress, *Vo v. France,* App. no. 53924/00, Judgment (Merits), Court (Grand Chamber) 08/07/2004, [3]) Judge Ress therefore argues that a foetus may enjoy protection under the ECHR, especially under Article 8(2) (Dissenting judgment of Judge Ress, [4]) and that Article 2 is applicable to children even before birth. (Dissenting judgment of Judge Ress, [9]) Judge Mularoni cites the fact that all European states have special legislative provisions regarding abortion means consensus exists that the foetus does have some kind of rights requiring protection (Dissenting opinion of Judge Mularoni joined by Judge Strážnická, *Vo v. France,* App. no. 53924/00, Judgment (Merits), Court (Grand Chamber) 08/07/2004).

The preceding discussion highlights the differences existing within regional human rights law and constitutional approaches to the unborn child. Some states explicitly assert via constitutional provisions that the unborn child receives protection pre-birth, whilst others, despite also granting such protection, balance this with protecting the competing rights of others to avoid human rights violations. Regional human rights law jurisprudence, albeit limited in this area, shows that where instruments are not explicit regarding protection of the unborn child, this does not rule out the possibility of pre-birth protection; this is consistent with the basis left open by the CRC. Of particular relevance to this paper's hypothesis is the fact that base level commonality exists between many states that unborn life is worthy of some sort of protection (for example as highlighted in *Vo v. France* amongst European states). This is the case even if the protection is much narrower in scope than the protection attaching to a child once born, and acknowledging that in some instances it will raise a conflict with the rights of other parties (for example, the child's surrogate mother) necessitating a rights-balancing exercise weighing the competing rights to identify the approach to be taken.

Two concepts raised by the regional human rights jurisprudence discussed are also relevant for approaching the child's pre-birth situation in ICS, insofar as it impacts on their rights once born. The first is the concept of human dignity, and the idea that given the potentiality of a being once in-utero, pre-birth protection of the rights it will be entitled to once born is necessary based on human dignity. This accords with the position that despite not being a person, a foetus is a being worthy of some protection (despite this not being absolute), given its potentiality to become a human being. Although this would only cover the prenatal stage of ICS (that is, once a child is conceived), the second concept – viewing the future child's rights through an *in eventu* argument – could extend to the preconception stage of ICS. This would lead to framing the child's rights pre-birth in ICS (including the preconception stage) with an approach based on the position that 'assuming that the child will be born', it is in the future child's best interests that they receive pre-birth protection that secures, to the greatest extent possible, their ability to exercise and enjoy their CRC rights once born. A clear example of this in ICS is that the

child's right to identity preservation should be protected through Article 8 consistent actions and decisions during the preconception stage of ICS, namely by using donor gametes which are identifiable.

It is also important to acknowledge that protecting the child's rights most at risk in ICS due to preconception and prenatal decisions and actions does not preclude abortion; protecting the child's rights pre-birth does not mean the child has an absolute right to life, but rather is directed towards leaving open the possibility of the child being able to exercise and enjoy their rights (which may otherwise be violated in ICS through decisions and actions occurring at the preconception and prenatal stages), in the event that they are born. If the child does not end up being born, this still does not mean that the child's other rights could not have been protected preconception and prenatally in ICS, given the particular child rights identified as being at risk in ICS, triggered through situations arising during these pre-birth stages. Protecting the future child's rights pre-birth (both preconception and prenatally) so that *in eventu* they are born, they can enjoy and exercise these rights, does not mean attributing rights pre-birth, but rather attributing future rights, given the risks triggered to the rights already discussed as being placed at risk pre-birth in ICS. On this basis, in ICS some protection of the child's future rights preconception and pre-birth is required, to prevent these rights being rendered empty upon birth.

4.2 Selected domestic and regional jurisprudence concerning specific non-ICS pre-birth issues

Domestic jurisprudential approaches to two non-ICS situations concerning the impact of actions and decisions during the prenatal stage on the rights of children once born are worth briefly highlighting, to assess if they might assist in addressing child rights impacts in ICS stemming from a lack of protection pre-birth.

4.2.1 Wrongful life legal actions, including those based on failures to undertake prenatal testing

'Wrongful life' legal actions rest on arguments that a failure (for example, of a medical professional/organisation) to take an action prenatally (such as genetic screening tests) meant a birth was unable to be prevented, amounting to a negligent act. Such claims have been rejected by courts in domestic jurisdictions such as Australia, Germany and the UK. For example, the German Federal Constitutional Court ruled wrongful life claims unconstitutional because they conflict with the German human dignity principle (Article 1, German Basic Law), on the basis that a duty to prevent a child's birth because he/she will likely have a condition making his/her life appear valueless raises

a conflict with tort law duties (normally centring on protecting personal integrity) (Bundesgerichtshof (Sixth Civil Senate) BGHZ 86, 240, JZ 1983, 447).

However, wrongful life claims brought by children (or on their behalf) and claims brought by parents in their own right have succeeded in a few domestic jurisdictions, for example in the Netherlands and some US states. Of such successful claims, the reasoning of the Supreme Court of California in *Turpin v Sortini* (31 Cal 3d 220; 643 P 2d 954 (Cal 1982) is notable as it places great weight on the best interests of the child: "Although in deciding whether or not to bear such a child parents may properly, and undoubtedly do, take into account their own interests, parents also presumptively consider the interests of their future child. Thus, when a defendant negligently fails to diagnose a hereditary ailment, he harms the potential child as well as the parents by depriving the parents of information which may be necessary to determine whether it is in the child's own interests to be born with defects or not to be born at all." (*Turpin v Sortini,* [233]-[234]) This ruling therefore stands for the principle that some steps should be taken prenatally to protect the future child's best interests once born.

Recently, the South African Constitutional Court delivered a judgment considering whether "the child may have a claim for patrimonial damages against a medical expert in circumstances where a prenatal misdiagnosis of a medical condition or congenital disability deprived the child's mother of the informed choice to abort." (*H v. Fetal Assessment Centre* [2014] ZACC 34, [80]) With reasoning heavily emphasising the need to protect the rights and best interests of the child at birth (for example, at [48]-[52]), the Court held that wrongful life claims are not inconceivable under the South African Constitution ([52]), and a child's wrongful life claim may potentially be found to exist. ([81]) Consequently, the South African Constitutional Court has left open the possibility of successful wrongful life claims (with the case in question now returned to the High Court for determination).

The ECtHR has also given judgments in a number of applications concerning wrongful life claims regarding failures to provide prenatal testing. In *Costa and Pavan v. Italy* (App. no. 54270/10 Judgment (Merits and Just Satisfaction), Court, Second Section 28/08/2012), the Court held Article 8 applicable regarding refusal of preimplantation genetic diagnosis (PGD) screening of an embryo intentionally created from gametes of cystic fibrosis carriers ([57]). Finding a violation of Article 8, the Court rejected the Government's justification of refusing prenatal screening to protect the health of the child and the pregnant woman, the dignity and freedom of conscience of the medical professionals and to guard against eugenic selection ([61]). The Court said "While stressing that the concept of "child" cannot be put in the same category as that of "embryo", it fails to see how the protection of the interests referred to by the Government can be reconciled with the possibility available to the applicants of having an abortion on medical grounds if the foetus turns out to be affected by the disease, having regard in particular to the consequences of this both

for the foetus, which is clearly far further developed than an embryo, and for the parents, in particular the woman." ([62])

R.R. v. Poland (App. No. 27617/04 Judgment (Merits and Just Satisfaction), Court (Fourth Section) 26/05/2011) concerned the birth of a child born with Turner Syndrome after his mother (the applicant) was refused access to prenatal genetic testing to confirm foetal abnormalities existed, the likelihood of which had been detected by ultrasound. The refusal of prenatal testing prevented the applicant taking a decision regarding lawful abortion. The Court found a violation of Article 3 (prohibition of inhuman and degrading treatment) and Article 8 regarding the applicant's inability to access medical procedures enabling her "to acquire full information about the foetus' health" ([198]) in order to make a decision regarding abortion; the State was obliged to ensure unimpeded access to prenatal information and testing relating to the health of pregnant women and foetuses. ([156]-[157])[41]

These wrongful life cases show that courts have, in some instances, emphasised the need to consider the potential consequences of prenatal actions and decisions for the future child once born, and upheld the need to take prenatal actions consistent with protecting the future child's rights and best interests. Whilst the court's approach of emphasising the interests of the child in *Turpin* is certainly positive and can be extended to ICS situations, the extent to which commissioning parents "presumptively consider the [rights and] interests of their future child" during the preconception and prenatal stages in ICS remains, without empirical research, unclear. Certainly however, if commissioning parents did give greater consideration to this and take actions and decisions aligned with protecting the rights of their future child(ren), many of the problems identified as arsing during the prenatal stage of ICS and the associated rights implications for the child post-birth may be alleviated. For example, this could manifest in commissioning parents choosing not to abandon a child conceived through ICS in instances where a disability or serious medical condition is detected, or when a multiple birth occurs, given abandoning a child may not align with protecting the child's rights.

Drawing on the South African Constitutional Court's approach too, applying the need to protect the rights and best interests of the child at birth to the ICS context, protection of some rights at birth relies on these rights being protected and preserved before birth and even before conception. This is clear in relation to the potential impact of actions and decisions occurring preconception on the child's rights relating to identity, health and knowing his or her parents. Furthermore, by placing importance on the consequences of pre-birth

41 In *A.K. v. Latvia,* App. no. 33011/08, Judgment (Merits and Just Satisfaction), Court (Fourth Section) 24/06/2014, the ECtHR also found a violation of Article 8 in its procedural aspect. In this case, the denial of adequate and timely prenatal screening tests prevented the applicant making an informed decision regarding abortion; she subsequently gave birth to a child with Down Syndrome.

actions (or omissions) for the foetus as a future child in *Costa and Pavan v. Italy* and *R.R. v. Poland*, the ECtHR effectively emphasises the need to prioritise the future child's rights and best interests (while balancing them with the pregnant woman's rights), by requiring certain actions to be taken or avoided pre-birth to give the child the possibility of a life situation according with their best interests. In these two cases, a direct line is drawn between the consequences of what occurs pre-birth for the child's best interests and health-related rights post-birth; this is highly relevant to the ICS context regarding the need to protect the future child's rights pre-birth, for them to be enjoyed and exercised post-birth.

4.2.2 *Actions of a pregnant woman detrimentally impacting on the unborn child and future child*

The Courts in many jurisdictions have considered the balance to be struck between the interests of the pregnant woman and her unborn child in instances concerning pregnant womens' prenatal decisions which may negatively impact foetal health or the child's health once born. *Winnipeg Child and Family Services (Northwest Area) v. G (D.F.)* (Canadian Supreme Court) is a leading authority, concerning whether legal grounds existed to require a pregnant woman to receive hospital treatment and counselling for drug addiction (without her consent). The Supreme Court held such actions would amount to forced treatment and detention, violating her constitutional rights. It held that the courts do not have authority to require a competent pregnant woman to receive medical treatment she does not want and that "a judicial intervention designed to improve the health of the foetus and the mother may actually put both seriously at risk […] In the end, orders made to protect a foetus' health could ultimately result in its destruction."

Whereas *Winnipeg* concerned decision-making powers over pregnant women directed towards protecting unborn children, the UK Court of Appeal recently dealt with a case brought by a child relating to her mother's actions during pregnancy. The child was born with severe brain damage, experiencing learning, memory, developmental and behavioural problems caused by foetal alcohol spectrum disorder (FASD) (*CP (A Child) v. First Tier Tribunal (Criminal Injuries Compensation) (British Pregnancy Advisory Service/Birthrights and another intervening)* [2014] EWCA Civ 1554, [2014] All ER (D) 48 (Dec)). The Court dismissed the child's claim, saying she was not entitled to compensation for the actions of her mother; her mother had not committed a criminal offence by excessively consuming alcohol while pregnant. ([44]-[45]) Furthermore, the Court said grievous bodily harm inflicted on a foetus does not amount to criminal activity, as grievous bodily harm on a person is required; a foetus is a "sui generis organism", not a person. Varney observes the judgment implies "that the right of pregnant women to make their own decisions about their pregnancies and their actions while pregnant is almost absolute." (Varney,

2014, 2) This decision clarifies that in the UK, children with FASD are unable to claim criminal injuries compensation, as they are not viewed under law as having been the victim of a criminal act.

However, this decision is questionable from a child rights perspective as the impacts of FASD experienced by the child have a clear causal link to her mother's alcohol abuse while pregnant; to undertake such actions as a parent undoubtedly runs counter to the child's best interests, as manifested in the child's life following birth. Indeed, some Canadian and US states have passed legislation or developed jurisprudence establishing that substance abuse during pregnancy amounts to child abuse.[42] Minnesota, South Dakota and Wisconsin provide examples of states that have gone further, passing legislation establishing substance abuse during pregnancy as grounds for authorising (forced) civil commitment to a treatment programme (to protect the foetus), (Guttmacher Institute, 2016, 1) while Tennessee has legislation establishing substance abuse during pregnancy as a criminal offence. (Guttmacher Institute, 2016, 1)

The above jurisprudential approaches to the situation of the unborn child show the continuing legal divergence in this area. However, they are relevant to the ICS context as they show the possibility for future claims by children born through ICS based on arguments that they have experienced harm resulting from the decisions and actions of their surrogate mothers while pregnant. In the ICS context, children could arguably also bring claims relating to pre-birth actions and decisions taken by their commissioning parents and other third parties, such as medical practitioners, detrimentally impacting on them once born. This could be envisaged regarding actions and decisions at both the preconception and prenatal stages. An argument could even be made by a child relating to the actions of a genetic parent who acted as an anonymous gamete donor, on the basis of detrimental impacts the child experiences relating to their identity and health rights and their right to know their parents. However, given the anonymity of the donor, in practice such claims would need to be made either against the state or a private actor, such as a fertility clinic/doctor, arguing they should not have allowed anonymous donor gametes to be used.

While the claims made in the domestic judgments discussed in this section have been confined to actions amounting to criminal offending, taking a progressive child protection approach, there is a strong argument in favour of ensuring the balance of protection rests in favour of the child's best interests in the ICS context, even in situations not constituting criminal offending but which have a potential lifetime impact on a child's development and best

42 Alabama, Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Michigan, Nevada, Oaklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin. See also e.g. the Canadian cases of *Re Children's Aid Society for the District of Kenora and JL,* 134 DLR (3d) 249, 1982 WDFL 390 (Ont Prov Ct) and *M(J) v. Superintendent of Family and Child Services* [1983] 4 CNLR 41, (1983) 35 RFL (2d) 364 (BCCA).

interests. The human rights-based argument that children could make in future regarding detrimental pre-birth actions and decisions in ICS by surrogate mothers, commissioning parents and other third parties has the potential to be highly convincing.

4.2.3 Embryos created through ART

Certain cases concerning embryos created through ART are relevant to the present focus on ICS. In *Evans v. United Kingdom* (App. no. 6339/05, Judgment (Merits), Court (Grand Chamber), 10/04/2007), the ECtHR held that an embryo does not have independent rights or interests and cannot claim (or have claimed on its behalf) a right to life under Article 2 of the ECHR (relying on *Vo v. France*: the embryo/foetus is not a person) (*Evans v. United Kingdom*, [54]; [56]). However, more recently in *Parrillo v. Italy* (App. no. 46470/11, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), 27/08/2015), the Grand Chamber observed that stored, unused embryos were part of the applicant's (the future child's genetic mother) identity because they contained her genetic material, therefore engaging Article 8 ([158]-[159]) (however, no violation was found). The ECtHR found Article 2 was not at issue on the facts of the case, but also said human embryos are not possessions.[43] The use and control of pre-embryos created through ART and stored gametes are relatively novel legal issues internationally,[44] continuing to develop. It is possible that the incidence of cases concerning disputes over the control and use of stored embryos (for example, by claimants seeking to use embryos against the wishes of their former partner) will increase. It remains to be seen whether courts will take into consideration the rights and best interests of the future child (for example, to know and be cared for by parents; to preserve their identity), or whether focus will predominantly rest on the wishes of the persons who created the embryo with their genetic material. In one such case, the Illinois Appellate Court recently ruled in favour of an appellant seeking to have her own genetic child against the wishes of her former partner, by using three cryopreserved pre-embryos created during their relationship (*Szafranski v. Dunston*, 2015 IL App (1st) 122975-B). The Court granted the appellant sole custody and control over the disputed pre-embryos, however, its reasoning for doing so focused on balancing the interests of the two disputing parties, without reasoning concerning the potential rights and best interests of any future children born via successful gestation of the pre-embryos.

43 Within the meaning of Protocol No. 1 to the Convention (personal property); therefore the Protocol did not apply.

44 For discussion, see: Schwartz, M., "Who owns pre-embryos?", *The New Yorker* 19 April 2015, http://www.newyorker.com/tech/elements/who-owns-pre-embryos (accessed 02 February 2016).

At a general level, while there remains a lot of work to be done to clarify the legal status of human embryos, the principle made clear in the European context, that human embryos are not possessions, recognises that some level of protection (as yet, undefined) is necessary in relation to actions impacting on embryos, despite their lack of independent personhood. The European approach appears to be underpinned by the concept of human dignity, given the potentiality of the embryo to become a future child. The approach of the Illinois Appellate Court illustrates the need to ensure that the rights and best interests of the potential future child that could result from the use of embryos are made central considerations in the ART and ICS context, given the lifelong impacts the child could experience resulting from decisions concerning the use of embryos in situations where the competing interests and intentional decisions of the adults involved may not align with the future child's rights and best interests.

5 Implications for the Future Child's Rights of the Intentional, Planned Nature of ICS and the Involvement of Multiple Possible Parents

Analysis in this paper has highlighted the potential impact of preconception and prenatal actions and decisions on the rights of children born through ICS arrangements, demonstrating these impacts are tied to the pre-birth actions and decisions of commissioning parents, surrogate mothers, genetic parents and other third parties involved in ICS (such as medical professionals). Indeed, without the involvement of all these parties in ICS, ICS would not have developed as an alternative method of family-building. In part, it is this involvement of multiple parties that distinguishes ICS from other methods of family-building, but more so it is the involvement of multiple potential parents to the child, combined with the intentional, planned nature of ICS that differentiates it from other forms of family-building. These factors complicate the future child's rights, given their enjoyment and exercise of the key rights already identified once born is dependent on actions and decisions taken preconception and prenatally by their multiple potential parents and other third parties to the ICS arrangement. As already outlined, in ICS it is possible for adult parties to purposely take pre-birth actions and decisions that contradict the future child's rights. Despite the parties to ICS arrangements having the choice whether to take actions and decisions which will uphold and safeguard the future child's rights, sometimes they chose not to. This underscores the need to actively build-in protection of the child's rights most at risk preconception and prenatally, so they have the opportunity to exercise and enjoy these rights once born. Also, given the complexity arising through the involvement of multiple potential parents, where conflicts arise between these parties pre-birth, these can have lifelong impacts on the future child.

The preconception intention and associated planning of the commissioning parents is the foundation of all ICS arrangements. This places strong responsibility on the commissioning parents, because they have a choice whether to take the future child's rights into account or not, and whether to take actions and decisions preconception and prenatally which align with the future child's best interests and rights. For example, unlike in traditional conception situations (where, although similar child rights issues such as identity preservation and the right to know and be cared for by one's parents may arise), in ICS a series of intentional and planned steps lead up to the conception and birth of a child, including many decision points within the control of commissioning parents in particular. Some examples of pre-birth decision points are whether to:

- use anonymous or identifiable gametes (preconception stage);
- involve an anonymous or known surrogate mother (preconception stage);
- take responsibility for a child even if they have a disability or serious medical condition (prenatal stage); and
- take responsibility for multiple children if a multiple pregnancy occurs (prenatal stage).

In all such instances, commissioning parents intentionally choose to take actions consistent or inconsistent with the future child's rights.

Furthermore, applying the Article 18(1) CRC standard of the common responsibilities of parents "for the upbringing and the development of the child" and that "the best interests of the child will be their basic concern" in a dynamic and evolutive manner to the ICS context, commissioning parents should be seen as having an obligation to consider and act consistently with the future child's rights and best interests pre-birth, given their intention to parent the child. This obligation can arguably also apply to surrogates, given that they may be characterised as 'parents' in ICS, despite the fact they do not intend to socially parent the child once born. Extending Article 18(1) to its fullest potential extent in ICS, arguably genetic parents too, have parental responsibilities regarding the future child; by applying Article 18(1) to genetic parents in ICS it would, for example, follow that they should choose to only become genetic parents in ICS arrangements if they are willing to do so on an identifiable basis and be known by the future child (therefore safeguarding the child's rights to identity preservation, to know and be cared for by their parents and to health). Consistent with Article 18(1) CRC, during the preconception and pre-birth stages of ICS, commissioning parents, surrogate mothers and genetic parents should therefore take actions and decisions enabling the future child to exercise and enjoy their rights once born, consistent with their best interests. In doing so, they should, for example, avoid preconception and prenatal actions and decisions which may trigger the detrimental impacts on the child's identity, health, family environment, well-being and security rights once born, as discussed earlier in this paper.

Given the above, it is clear that this paper's hypothesis is convincing, that due to the intentional, planned nature of ICS, the involvement of multiple possible parents and the potential impact of preconception and prenatal decisions and actions on the rights of children born through ICS arrangements, preconception and prenatal protection of the unborn child is required in all ICS situations. Moreover, it is within the purview of parties to ICS – in particular, first and foremost, commissioning parents, as well as surrogate mothers and genetic parents – to ensure that their preconception and prenatal actions and decisions align with and uphold the child's future rights.

6 A PROPOSED APPROACH TO PRECONCEPTION AND PRENATAL PROTECTION OF THE RIGHTS OF THE FUTURE CHILD MOST AT RISK IN ICS

In order to protect the future child's rights which are at most at risk in ICS from the negative impacts of preconception and prenatal actions and decisions, and given that this is permissible under the public international law framework, what kind of pre-birth protection should be provided? While the law traditionally approaches human rights as attaching from the moment of birth given the legal parameters of the concept of 'personhood',[45] the various approaches discussed under international child rights law, regional human rights law, domestic legislation and jurisprudence show that the unborn child can and does benefit from protection before birth to some extent. This shows that despite no international human rights law instrument explicitly establishing that the unborn child has rights under law, this does not mean that the unborn child is not to be afforded any protection before birth. On the contrary, as indicated by the CRC *travaux préparatoires* and the views of the Committee on the Rights of the Child, the child can be protected prior to birth in ways that do not violate the rights of other persons when they potentially conflict (such as pregnant women); in some instances it is necessary for this protection to begin before a child's birth, to ensure certain rights are secured post-birth. Indeed, the inclusion of the ninth preambular paragraph in the CRC leaves open the option of pre-birth protection of children. Although state practice regarding protection of the unborn child is inconclusive as a result, a common thread running through much of the jurisprudence discussed is that it is possible for the child to be afforded some protection before birth (without conferring rights before birth). As has already been established, the problems and challenges to child rights in ICS triggered by actions and decisions preconception and prenatally are largely caused through involvement of multiple potential parents and the intentional, planned nature of ICS. Indeed, some of

45 For discussion, see Herring, J., 'The Loneliness of Status: The Legal and Moral Significance of Birth' in F. Ebtehaj and J. Herring *et al.* (eds.), *Birth Rites and Rights* (Hart: Oxford, 2011), 97-98.

the child rights problems triggered during these pre-birth stages have potential impacts for children's rights post-birth which are, to some extent, lifelong.

6.1 Framing the future child in ICS through an in eventu approach

It is suggested that a viable approach to protecting the future child's rights from impacts triggered during the preconception and prenatal stages of ICS is taking an *in eventu* approach to the future child in ICS. This is consistent with a child rights approach, meaning that the child's ability to exercise and enjoy their rights *in eventu* they are born is preserved, rather than curtailed by actions and decisions taken before their birth. Such an approach acknowledges that despite not being a legal person before birth, during the prenatal stage the unborn child is not a nothing, but is a being that could become a child, entitled to rights in the event that they are born. Moreover, in ICS situations, given the impact of actions and decisions preconception too, the future child's rights must be protected from this earlier stage in order for them to be able to enjoy and exercise their rights in the event they are born. Through framing preconception and prenatal actions and decisions in ICS with an *in eventu* approach, parties to ICS will be encouraged to consider the potential impact of these on the future child's rights and best interests and in turn, on the multiple potential parents themselves.

6.2 Basic safeguards for protecting the future child in ICS from rights impacts triggered preconception and prenatally

Informed by an *in eventu* approach, a three-pronged set of strategic safeguards is proposed, aimed at protecting the future child in ICS from the negative child rights impacts once born which have their roots in preconception and prenatal actions and decisions. These safeguards are informed and underpinned by international human rights law norms and standards, applying the CRC in a dynamic manner to ICS as a current-day challenge to children's rights, using the opening left by preambular paragraph nine CRC to ensure children born through ICS are afforded protection of their rights, including those potentially placed at risk in ICS preconception and prenatally. This set of safeguards is largely formulated through suggested practical measures which can strategically influence and shape preconception and prenatal choices and actions of parties to ICS arrangements, and therefore counter the otherwise negative implications for a child's rights once born through ICS. The suggested strategic safeguards centre on education; professional codes of practice/best practice guidance; and inserting the child's voice and perspective into ICS decision-making and actions.

6.2.1 *Education*

Educating parties to ICS arrangements about the child rights implications of their actions and decisions during the preconception and prenatal stages is a potentially strong safeguard for the future child's rights at risk under Articles 2, 3, 7, 8, 23, 24 and 35. Through education, parties can become attuned to how their actions and decisions preconception and prenatally can trigger negative impacts on the future child's rights; they may be more likely to take actions and decisions upholding and leaving open these rights, instead of curtailing them.

Education should strategically target some key actors in ICS arrangements who have a key influence on the child through their decisions and actions taken during the preconception and prenatal stages: medical professionals, legal advisors and prospective commissioning parents/commissioning parents. Education of medical professionals involved in ICS can usefully focus on developing their understanding of the CRC rights most at risk in ICS through preconception and prenatal actions and decisions, and the role they play guiding rights-based actions and decisions in this respect. For example, medical professionals must understand preconception child rights risks in ICS, particularly relating to identity preservation and why the use of anonymous gamete donors and surrogate mothers should be avoided in the best interests of the future child. During the prenatal stage, it is essential that medical professionals understand the child rights implications of non-medically necessary foetal reduction, so this practice does not occur in ICS. The responsibility of ensuring medical professionals are educated in this way largely rests with CRC States Parties and domestic and international medical governing bodies. States Parties and medical governing bodies should disseminate information about the CRC to medical professionals working in this area, with clear educational guidance around its relevance and application in the preconception and prenatal ICS context.

Similarly, educating legal advisors involved in ICS to ensure they understand the child rights risks arising preconception and prenatally in ICS is essential, so they can provide legal advice to commissioning parents covering potential child rights implications of preconception and prenatal actions and decisions for the future child and how this might impact them as parents. Once educated on the potential child rights implications, legal advisors are, for example, well-placed to guide and influence commissioning parents to avoid using anonymous gametes and involving anonymous surrogates. CRC States Parties and domestic and international legal governing bodies should ensure legal advisors dealing with ICS understand the CRC's application in the preconception and prenatal ICS context and their role in ensuring protection of future children born this way.

Education of prospective commissioning parents/commissioning parents should be undertaken to empower them with an understanding of their CRC

responsibilities (framed through Article 18(1)), the rights of the child at stake and how their decisions and actions preconception and prenatally will impact the child's rights and best interests once born. Regarding the preconception stage, education of prospective commissioning parents should focus primarily on Article 8 CRC, build their understanding of the principles of non-discrimination and the best interests of the child, and how they can act to uphold these rights and principles before conception and birth for the future child. Many actors have a role to play in educating commissioning parents: legal advisors, medical professionals and States Parties to the CRC. The provision of accurate information about the child's rights and ICS can usefully be disseminated via a range of methods: meetings, social media and message-boards and via public awareness campaigns. Such education will encourage commissioning parents to approach ICS arrangements in a more child-centric manner, considering the rights and best interests of the future child at all preconception and prenatal decision points, whilst yielding to the rights of the surrogate where her health or reproductive autonomy is endangered.

While education is proposed as an important safeguard, it is acknowledged it has limits as a measure to protect the rights of future children born through ICS preconception and prenatally. For example, although education can influence commissioning parents' decisions and actions, in states without clear regulation of ICS, they ultimately have broad decision-making freedom over many of the choices impacting on the future child's rights and best interests. This is why domestic legal frameworks and international regulation of ICS with child rights standards and protective safeguards at their heart must be developed and implemented in the long-term, to ensure the child's rights and best interests are paramount. Such child-centred regulatory approaches may in practice require that certain aspects of ICS, such as the use of anonymous gametes, are prohibited.

6.2.2 Professional codes of practice/best practice guidance

In the absence of international agreement on ICS, national governments and national medical bodies/authorities can play an important role in ensuring the development and implementation of professional codes of practice/best practice guidance on processes involved in ICS raising preconception and prenatal risks to the future child. In particular, professional codes of practice/best practice guidance is are required to safeguard against situations whereby gametes and/or embryos are lost or mixed-up and incorrectly implanted in clinical settings, impacting on the child's Article 7 and 8 rights in particular once born. ICS supply-side states have a particular responsibility to ensure such codes of practice/best practice guidance is developed, establishing clear clinical standards and processes to be adhered to in ICS. States should do so working with medical bodies/authorities, and both have a role to play in ensuring the implementation of such standards and guidance by individual ICS clinics and

medical professionals. Demand-side states can also helpfully work with supply-side states to share best practice knowledge in the establishment of such codes of practice/best practice guidance.

6.2.3 *Inserting the child's voice and perspective into ICS decision-making and actions at the prenatal stage*

Explicitly inserting the future child's voice and perspective into ICS decision-making and actions prenatally is the third aspect of the suggested pre-birth safeguards for the future child's rights and best interests. To do so, CRC States Parties should ensure the appointment of a guardian representing the future child's rights and best interests in every ICS arrangement, from the time an ICS pregnancy is confirmed. It is at this point in time that the future child goes from being an abstract idea to a potential reality, and it is therefore practicable to involve a guardian for the future child in decision-making in the ICS arrangement. States Parties to the CRC may also be willing to fund the appointment of a guardian from this point in time, given the concrete possibility of a child eventuating from the ICS arrangement. The appointment of such a guardian for the future child's rights and best interests would not mean that the interests and rights of the commissioning parents, genetic parents and surrogate would be subordinated to the future child's, but rather that the future child's rights and best interests become a central focus of the actions and decision-making processes of these adult parties, and their rights and best interests are taken into account in relation to those of the adult parties. As the future child would not be able to instruct the guardian, the guardian would be appointed on the basis that they would advocate for and in the best interests of the future child and their rights. Wherever possible, this mechanism would therefore encourage the taking of prenatal ICS actions and decisions which protect and leave open the exercise and enjoyment of rights for the future child. The guardian can play a crucial role in ensuring that commissioning parents, genetic parents and surrogates understand why their taking of actions and decisions consistent with the future child's rights and best interests will also be of benefit to them once the child is born, as well as reminding them of their responsibilities in relation to the future child under Article 18(1) CRC.

It is acknowledged that the viability of implementing the mechanism of a guardian for the child's rights and best interests in every ICS situation has inherent challenges – for example, garnering funding for such a mechanism. However, appointing an independent person tasked with bringing the future child's voice and perspective into all decisions and actions prenatally in ICS arrangements has a powerful potential protective impact on the future child's rights and best interests. Specific focus of the guardian's attention is likely to centre on protecting the future child's rights under Articles 2, 3, 7, 8, 23, 24 and 35 CRC; for example, in relation to ICS situations where commissioning parents decide prenatally they do not want to take responsibility for children

from a multiple pregnancy or with a detectable disability or serious health condition, and where there is a disagreement between the parties to the ICS arrangement about the wellbeing or care of the future child. The guardian should be a person with expertise in child rights/child protection, appointed in the state in which the child is in utero and going to be born in. Locating the guardian here is the most practical approach, likely to maximise the benefit of such an appointment; the guardian can be an 'on-the-ground' bridge, mediating and communicating between third parties (such as medical professionals), the surrogate and the commissioning parents, the latter whom are most likely to be located in their own home state during the prenatal stage). The guardian's mandate will focus on ensuring the future child's voice and perspectives relating to their rights and best interests are infused into all ICS arrangements and guide all decisions and actions taken within ICS arrangements. Such a guardian's role will particularly come to bear in disputed situations between parties to an ICS arrangement, and would provide a safeguard against the more extreme possible child rights violations within the ICS context, such as child trafficking (given that the existence of a guardian appointed to the child would provide a potential obstacle to commissioning parents taking steps to traffick a child between countries). Such a guardian could play a useful role in ICS arrangements postnatally as well, by ensuring the child has someone representing their rights and best interests in the face of any remaining child rights challenges they may encounter post-birth, such as unclear legal status, abandonment, statelessness and multiple parentage claims. It is therefore envisaged that the guardian's mandate could either expire once the child's legal parentage is established, or alternatively after a post-parentage monitoring phase (focusing on an assessment of the child's rights and best interests in the care of their legal parents) is concluded by the guardian.

The implementation of the suggested three-pronged set of strategic safeguards preconception and prenatally in ICS is geared towards ensuring that actions and decisions taken in relation to the unconceived and unborn child do not have a negative bearing on the future child's post-birth exercise and enjoyment of their rights. This should enable the child's future to remain as open as possible (Feinberg, 2007), despite their conception and birth through ICS. If an *in eventu* approach and the safeguards suggested are implemented, this will lead to ICS arrangements that are more child-centric, respecting and upholding the rights and best interests of the future child, reflected in arrangements involving the following preconception and prenatally:

- Use of identifiable gametes and embryos from donors willing to be contacted by the child in the future
- Surrogates acting in a known capacity and willing to be contacted by the child in the future
- Application of professional codes of practice/best practice guidance in the clinical setting to guard against mix-up situations

- No foetal reduction, other than on the basis of medical opinion it is in the best interests or necessary for the protection of the mental and/or physical health and well-being of the pregnant woman or the unborn child
- Clear agreement between the surrogate and commissioning parents regarding decision-making and control over the surrogate's health care and lifestyle decisions during the pregnancy, and an agreement on the process for resolving disputes should they arise
- Clear agreement between the surrogate mother and commissioning parents regarding the point in time following the child's birth that commissioning parents will assume care of the child, and an undertaking from the commissioning parents that they will take responsibility for the child regardless of their sex, disability or health status, and that they will take responsibility for multiple birth children
- The automatic appointment of a guardian representing the child's rights and interests following a confirmed pregnancy, to ensure the future child's voice and perspective relating to their rights and best interests informs all decisions and actions during the ICS arrangement
- In all situations where a decision or action can be taken aligning with the future child's rights and best interests, it will be, as long as it does not lead to a violation of the rights of another party to the ICS arrangement (in such situations, the rights of the child, despite being paramount, will be appropriately balanced with the rights of other parties).

ICS arrangements as outlined above should, therefore, lead to the future child being able to preserve their identity, grow up in a family environment and know their parents, and grow up knowing their human dignity has been respected at all points prior to their birth. Without taking the protective steps prior to conception and birth in ICS as outlined in this paper, the child's rights most at risk from these stages in ICS may be empty upon birth. Leaving children in ICS without protection of their rights upon birth does not align with the intention of the CRC framers; therefore, the CRC must be applied before conception and birth to the future child's rights in ICS.

In addition to the specific responsibilities identified for CRC States Parties, legal advisors, medical practitioners and commissioning parents, the importance of implementing the preconception and prenatal measures outlined in this paper could be promoted by national medical association governing bodies, particularly those focusing on the practice of ART/surrogacy; they could also usefully be promoted by private actors providing commissioning parents with information about ICS or providing ICS services, for example, surrogacy brokers and companies. At the international level, the ideas proposed in this paper should inform thinking on a possible international regulatory approach

to ICS, through the work of the Permanent Bureau of the Hague Convention on Private International Law (including its Experts Group).[46]

Given the focus of the Permanent Bureau on a long-term approach and possible international agreement relating to ICS, in the short-term, a practice note drawing on the practical measures suggested in this paper would be a useful soft law tool, encouraging making the future child's rights and best interests the determining factor in ICS arrangements by implementing child-centric practices in the preconception and prenatal stages of ICS. It would be helpful if such a practice note includes a checklist for commissioning parents when considering entering into an ICS arrangement, in order to make sure they consider the full range of preconception and prenatal issues (as discussed in this paper) that can impact the future child's rights and best interests, and how they can choose to act in a child rights consistent manner. Such a practice note could be issued, for example, by the Committee on the Rights of the Child. The promotion of such preconception and prenatal safeguards by an international body such as the Committee would not necessarily be indicative of its approval of ICS, but would serve to encourage that when ICS is practiced, it is undertaken in a manner placing central focus on the future child preconception and prenatally to protect their rights and best interests once born.

7 Conclusion

Alston's statement over 25 years ago that "while there is no basis for asserting that the notion that human rights inhere in the unborn child had been authoritatively rejected by international human rights law, there has been a consistent pattern of avoiding any explicit recognition of such rights" (Alston, 1990, 161) still holds true in relation to international human rights law. However, given the CRC leaves open the possibility of protecting the unborn child (in some domestic jurisdictions, as discussed in this paper, protection is extended to the unborn child), and having identified negative impacts on the rights of the child in ICS that begin preconception and prenatally as traversed in this paper, a dynamic interpretation of the CRC must be taken in light of ICS as a current-day challenge to children's rights. This necessitates re-envisaging how and when some rights – such as the child's rights to preserve their identity, to know their parents and to attain the highest standard of health – need to be protected in the specific context of ICS. As illustrated, if the specific rights of the child discussed in this paper are not protected preconception and pre-birth in ICS, they may be rendered meaningless and unable to be exercised by the child post-birth.

46 See for an overview of the work of the Permanent Bureau in this regard: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

ICS is a distinctive way of family-building, in part given the multiple potential parents involved, which creates complex, high-risk situations not only for the adults involved, but the children who are born from these arrangements. Moreover, given the intentional nature of ICS, in ICS there are clear opportunities both preconception and prenatally for commissioning parents in particular to safeguard the future child's rights; after all, it is only due to the intention of commissioning parents that the surrogate and genetic parents become involved in ICS. Therefore, in ICS, some protection must be extended to the future child during the preconception and prenatal stages, so they can exercise and enjoy their CRC rights once born. As discussed, in ICS this protection must extend not only to the prenatal stage but also to the preconception stage, as during this stage key actions and decisions are taken which can shape the child's lifetime outcomes relating to their right to preserve their identity and to know and be cared for by their parents.

By taking an *in eventu* approach and through the range of ICS actors identified in this paper implementing the specific strategic preconception and prenatal safeguards proposed, the future child will have a better chance to exercise and enjoy their rights than they would have otherwise. This does not mean that rights are attributed before birth, but rather, the possibility of the child being able to exercise and enjoy their rights once born is left open for them, by taking decisions and actions preconception and prenatally that accord with and are protective of the future child's rights and best interests. Although children do not achieve legal personhood until birth, this does not prevent children being afforded some limited protection prior to birth that will assist in giving effect to their rights, in the event they are born. By focusing the suggested safeguards around education, codes of practice/best practice guidance and inserting the child's voice and perspective into actions and decision-making at the prenatal stage, despite remaining challenges to implementation, these are safeguards that are practical and which may have a far-reaching protective effect on children born through ICS. The aim is to ensure the future child's rights and best interests are considered and wherever possible protected preconception and prenatally (while being balanced with the rights of other parties), thereby leaving open the possibility of the future child exercising and enjoying their rights once born. Whilst this may limit the interests of adult parties to ICS some extent, such an approach is consistent with the spirit and intent of the CRC, despite the CRC's framers not envisaging the ICS context. The safeguards for the future child's rights and best interests proposed in this paper rely on a joint approach by actors involved in ICS to the protection of the future child before conception and birth. However, commissioning parents have a particularly strong role to play to protect the future child's rights and best interests, and to ensure the future child's human dignity is upheld. Commissioning parents should view taking preconception and prenatal actions and decisions consistent with the future child's rights and best interests as part of their parental responsibilities under Article 18(1), in order to leave the

child's exercise and enjoyment of rights as open as possible in the event they are born. Such an approach is consistent with a dynamic and evolutive reading of Article 18 CRC; moreover, in the CRC context, arguably parental responsibility to protect the future child pre-birth applies not only to the commissioning parents, but also the future child's surrogate mother and genetic parents. Such a reading provides a holistic approach to the widest possible concept of the child's potential parents in ICS.

Despite the fact that international agreement is yet to be reached regarding whether ICS is a practice that should be allowed to continue, ICS continues to be practiced (in some states without any regulation), meaning children are continuing to be conceived and born this way. In the face of this reality and regardless of the lack of international agreement regarding ICS, the rights of children born through ICS arrangements must be upheld. This paper has shown that there are practical mechanisms and practices which can be introduced now and implemented by a range of actors in ICS, leading to better protection of the child's rights. Making the rights of the future child discussed in this paper meaningful post-birth hinges on these prenatal and preconception protections outlined being implemented, to give children born through ICS the best possible chance to secure their rights. The safeguards suggested in this paper are intended to guide practice, so the detrimental impact of preconception and prenatal actions and decisions on future children born through ICS is limited. We must leap through the window left open by the CRC to ensure actions and decisions that are child rights consistent before conception and birth, to allow all future children in ICS to secure their rights once born, rather than having them curtailed before they achieve personhood in the eyes of the law.

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7 Securing children's right to a nationality in a changing world

The context of International Commercial Surrogacy and twenty-first century reproductive technology and twenty-first century reproductive technology

Abstract

The challenge of securing the rights of children to a nationality has manifested acutely in the context of ICS, where child statelessness has emerged as a problem. As such, the child's Article 7 CRC right to nationality is one of the rights most significantly under threat in ICS. ICS involves children being born in one state via assisted reproductive technology and the involvement of a surrogate, who are intended as children of commissioning parents who originate or reside in another state. Through the application of domestic nationality laws to children born through ICS, conflict of laws situations are arising, leaving children stateless and stranded in their birth state, in instances where they do not acquire the nationality of their birth state. Drawing on theory and practice utilising case examples, this Chapter examines this challenge, placing it within the wider context of challenges to the concept of 'family' and family formation in the twenty-first century. This Chapter takes a solutions-based approach to the problem of child statelessness in ICS, proposing that practical solutions founded on pre-existing public international law norms and standards must be implemented now, before the problem of child statelessness in ICS deepens, further adding to global statelessness.

Main Findings

- As evidenced by case law, children born through ICS may face difficulties in acquiring nationality in three scenarios in the context of ICS, namely a) when a lack of recognition of the child's parentage prevents nationality acquisition; b) when nationality laws of the child's birth state and their commissioning parents' state of nationality conflict; and c) when a child is abandoned in his or her birth state by his or her commissioning parents.
- As a result of these situations, the practice of ICS has become a new cause of statelessness.
- Children who are stateless following their birth through ICS not only experience a violation of their Article 7 CRC right, but their statelessness may also lead to other infringements of their rights.

- The absence of international consensus concerning the practice of ICS does not need to be a barrier to cooperation between States to prevent child statelessness in ICS.
- It is recommended that the UNHCR, together with the Committee on the Rights of the Child, issue guidance to States urging them to implement without delay practical and effective solutions to preventing child statelessness in ICS, grounded in public international human rights law.
- Such guidance should reflect that a State which is the intended State of a child's residence in ICS will grant the child nationality if he or she would otherwise be stateless, as long as a genetic link between the child and at least one commissioning parent is proved; and States will grant nationality to an otherwise stateless child born on their territory through ICS.

Contextual notes

- Since the time this Chapter was written, the risk of child statelessness in ICS persists. This emphasises the ongoing relevance of this Chapter, and the need for children's rights and best interests to guide State decisions regarding individual children and nationality acquisition in ICS.

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1 Introduction

The past decade has seen a growth in children being conceived through alternative, medically assisted methods as a result of assisted reproductive technology (ART). This is an area of scientific advancement responding to and driving the development of new methods of family formation and new family forms. During this time, International Commercial Surrogacy (ICS) has emerged as one such family formation method, resulting in families being built across borders, enabled by ART and surrogate mothers. ICS uses reproductive technology and leverages globalisation and an international regulatory lacuna to meet the demand of 'commissioning parents' from a range of States, engaging in ICS for diverse reasons. ICS presents a number of human rights challenges to the parties involved, most significantly to the rights of children conceived and born through ICS who are particularly vulnerable given factors such as their lack of agency in infancy. One such challenge is that children are being born stateless in some ICS scenarios.

All children, including those conceived and born through ICS, have the right to acquire a nationality, explicitly established by Article 7(1) of the United

Nations Convention on the Rights of the Child (CRC).[1] The challenge of securing a nationality has manifested acutely for children conceived and born through ICS, where the child does not acquire nationality at birth *jus soli* (by birthplace) or *jus sanguinis* (by descent). In ICS, children are born in one State to a surrogate mother via the use of ART, but intended as children of 'commissioning parents' originating from another State; in most ICS arrangements, such children are expected to travel to and reside in their 'commissioning parents' State of nationality or residence. Due to the application of existing domestic nationality and citizenship laws, gaps in international and domestic laws and policies regarding ICS, and a lack of public education about the implications of birth through ICS for the child's rights and legal status, such children are falling victim to conflict of laws and facing difficulties in acquiring nationality following birth. In some cases children are born stateless, stranded in their birth State, despite the fact that, as Edwards asserts, "the duty to prevent statelessness, at least in respect of children, is emerging as a norm of customary international law".[2]

This chapter examines the challenge of securing the child's right to a nationality in our changing world, where having a child through ICS is a real – although sometimes last-resort – option for a growing number of prospective parents globally. It discusses the various scenarios of child statelessness in ICS, building an understanding of ICS as a new cause of statelessness occurring within the broader context of twenty-first century family formation. The wider human rights implications of statelessness for this group of children are examined through reference to illustrative cases and situated within the framework of relevant international legal provisions and standards. This chapter demonstrates that nationality is key to unlocking the child's wider rights and that upholding the child's right to nationality is critical if this group of children is to receive the rights they are entitled to under international law, consistent with the principle of the best interests of the child established by the CRC. This chapter shows that practical solutions to statelessness in ICS are within reach and should be implemented urgently, before the scale of ICS-caused statelessness grows.[3]

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1 Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3, Art. 7(1). Nationality is also explicitly referred to as an element of the child's identity under Article 8(1) of the CRC.

2 A. Edwards, "The meaning of nationality in international law in an era of human rights: procedural and substantive aspects", in A. Edwards and L. van Waas (eds), Nationality and Statelessness under International Law, Cambridge University Press 2014, p. 29.

3 It is acknowledged that securing the child's right to a nationality does not present a stand-alone solution to the broader human rights and legal status challenges faced by children conceived and born through ICS. As discussed later in this chapter, other challenges to the child's rights may well persist, despite the child securing their right to a nationality. See, e.g. European Court of Human Rights (ECtHR), Application No 65192/11, *Mennesson v. France*, 26 June 2014; ECtHR, Application No 65941/11, *Labassee v. France*, 26 June 2014. For further discussion of these cases see, C. Achmad, "Children's rights to the fore in the

2 Understanding the problem

2.1 ICS as a new method of family formation

ICS has become more widely available over the past decade as a new method of family formation. It involves a person or persons residing in one State (the 'commissioning parents') paying money to conceive a child and to have that child carried to term by a surrogate located in another State. ICS arrangements are premised on the intention of the 'commissioning parents' that the child will not live and grow up in the State of his or her birth, but rather in the State in which his or her 'commissioning parents' reside. ICS regularly uses ART techniques and procedures and, since the child is brought to term by a surrogate, is an attractive method of family formation for same-sex couples and single persons as well as heterosexual couples. Little data has been collected to date on the numbers of children born through ICS, and gathering accurate data on ICS remains difficult.

2.2 International Commercial Surrogacy as a new cause of statelessness

ICS has developed over the last decade in a largely unregulated manner, with particular supply-side growth located in States in Asia such as India, Thailand and Nepal.[4] Demand for ICS is flowing predominantly from 'commissioning parents' living in more developed States such as Australia, New Zealand, the United Kingdom of Great Britain and Northern Ireland (UK) and the United States of America.[5] The near-certainty of having a child, decreasing intercountry adoption options[6] and the desire of many 'commissioning parents' to have their own genetic child or a child who is at least genetically related to their partner make surrogacy attractive to such parents. The availability of practices unavailable in their countries of residence, lack of regulation in supply States and the low cost and relative speed further make ICS appealing.

European Court of Human Rights' first international commercial surrogacy judgments", European Human Rights Law Review 2014, Vol. 6, p. 638-646.

4 Although certain states in the United States of America (USA) are significant ICS suppliers and have been for much longer, they are not covered in this chapter since children born in the USA through ICS always receive US nationality as a result of being born on US territory, so statelessness does not arise.

5 R. Deonandan, "Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy", Risk Management and Healthcare Policy 2015, Vol. 8, 111-119, p. 115. Australia is said to be emerging as the highest per capita user of international surrogacy: Chief Federal Magistrate J. Pascoe, "State of the Nation – Federal Circuit Court of Australia", Federal Judicial Scholarship 2014, Vol. 21.

6 J-F. Mignot, "L'adoption international dans le monde: les raisons du déclin", l'Institut national d'études démographiques Report No. 519, 2015.

Despite ICS being viewed by many prospective 'commissioning parents' as a panacea enabling them to have a child, in practice it is a complex procedure due to the involvement of multiple parties, ART techniques and processes, as well as its trans-boundary character. There is no international regulation of ICS and national laws remain patchy and piecemeal. Therefore ICS arrangements are often made in contexts with limited legal clarity and certainty regarding their ultimate outcome. Pre-existing State level surrogacy laws are often formulated with a view to domestic surrogacy only; in many States such legislation outlaws commercial surrogacy and is silent on international surrogacy. While States take diverse approaches in relation to domestic surrogacy, provisions on this subject fall largely into three categories, namely: prohibitive (all forms of surrogacy are illegal); limitedly permissive (surrogacy is allowed in some situations, limited for example to altruistic surrogacy and situations of medical necessity); or silent (says nothing about surrogacy and has no policy on surrogacy). Attempts by States to apply these laws to ICS lead to situations where national laws of the States involved conflict, or where the gaps in national laws make the situation unclear. In recent years a small number of States have adopted legislative measures explicitly addressing ICS and recognising it as a specific form of surrogacy. Some have established legislative bans on ICS within their territory;[7] others make clear that engaging in ICS amounts to a criminal offence, applying extraterritorially.[8] One rationale underlying such bans on ICS is the argument that ICS amounts to the sale of children and must be guarded against.

Within this context, ICS has emerged as one of the newest causes of statelessness in the twenty-first century. Smerdon observes that "[i]nternational surrogacy arrangements have created paradoxical situations of 'legal orphanhood' where highly desired surrogate babies with arguably multiple parents are not recognized by either the child's country of birth or the country of the child's commissioning parent(s)".[9] 'Commissioning parents' may enter into ICS arrangements without comprehending the risk of statelessness for a future child. The complications surrounding the child's ability to acquire a nationality are inherently related to their relationship with their various biological and 'commissioning' parents, which may include all those involved with the child's conception and/or birth as a 'commissioning parent', surrogate mother, or gamete donor. A child born through ICS may face difficulties in acquiring nationality in a number of ways. As the three scenarios discussed below show,

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7 See, e.g. Thailand's Protection for Children Born through Assisted Reproductive Technologies Act 2015, http://www.senate.go.th/bill/bk_data/73-3.pdf; for a detailed overview of the Act, see S. Umeda, Thailand: New Surrogacy Law, Library of Congress, 6 April 2015, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404368_text.

8 See e.g. New South Wales (Australia) Surrogacy Act 2010 (2010 No. 102), Sections 8 and 11.

9 U.R. Smerdon, "Birth registration and citizenship rights of surrogate babies born in India", Contemporary South Asia 2012, Vol. 20(3), p. 341.

the risk of statelessness for children born through ICS depends on the positions on surrogacy of the birth State, the States of nationality of 'commissioning parents' and the nationality and parentage laws applicable in those States.

2.2.1 *Scenario one: Lack of recognition of the child's parentage prevents nationality acquisition*

Statelessness can occur in ICS where the child's birth State does not grant nationality on a *jus soli* basis and the child is unable to acquire the nationality of either the 'commissioning parents' or their surrogate, as none are recognised as the child's legal parent(s). This scenario can arise when there is confusion regarding who the child's birth State recognises as a legal parent of the child, and the 'commissioning parents'' State does not recognise them as the child's legal parents, leading to no one being recognised as the child's legal parent(s). A child can also become stateless under scenario one when the 'commissioning parents'' State of nationality requires the child to have a genetic link to at least one of the 'commissioning parents' to receive that State's nationality, but DNA tests are negative.

Scenario one can also arise in instances where the surrogate is not a national of the child's birth State, but a third-country national; for example, until recently, ICS was permitted in Nepal in instances where the surrogate was not a Nepalese national (but, for example, an Indian national).[10] In such situations, given that Nepal grants nationality *jus sanguinis*, if the child is not recognised as a national by the 'commissioning parent's' State of nationality or the surrogate mother's State of nationality, the child will be stateless. Finally, under this first scenario statelessness can occur when the child's birth State introduces a temporary or permanent prohibition on ICS within that State without clarifying the legal status of children currently *in utero* through an ICS arrangement, or children born in the State through ICS following the imposition of such a ban (as arose in Nepal in 2015[11]).

10 Following a Cabinet decision by the Nepalese Government on 18 September 2014, ICS was allowed in Nepal but prohibited the involvement of Nepalese women as surrogates, the donation of gametes by Nepalese citizens, and also prohibited the use of surrogacy services by Nepalese citizens. See R. Parajuli, Surrogacy in Nepal: Threat to reproductive right, The Himalayan Times, 18 August 2015, http://thehimalayantimes.com/opinion/surrogacy-in-nepal-threat-to-reproductive-right. However, following a decision by the Nepal Supreme Court on 18 September 2015, international surrogacy in Nepal is now prohibited. See, Embassy of the United States, Kathmandu, Nepal, Surrogacy in Nepal, 14 June 2016, http://nepal.usembassy.gov/service/surrogacy-in-nepal.html.

11 L. Kerin, Australian dad pleads for Government help after twin babies stranded in Nepal, Australian Broadcasting Corporation (ABC) News, 21 October 2015, http://www.abc.net.au/news/2015-10-21/australian-twin-babies-stranded-in-nepal/6871840 .

2.2.2 *Scenario two: Application of conflicting nationality and parentage laws by child's birth State and 'commissioning parents'' State of nationality*

The second scenario in which children conceived and born through ICS can end up stateless appears, in practice, to be more common than that discussed in scenario one. Here, children are unable to acquire a nationality following their birth due to national laws and policies of the child's birth State regarding the status of children, parentage and nationality conflicting with those applied by their 'commissioning parents'' State of nationality.

The initial factor leading to children being rendered stateless in this scenario is that their birth State does not view children born through ICS within that State as nationals, given that under its laws, they are the legal children of their 'commissioning parents' and therefore regarded as nationals of their 'commissioning parents'' State of nationality. Such States do not recognise the child's surrogate mother (and her partner, if she has one) as the child's legal parents and one or both 'commissioning parents' are listed as the child's parents on any birth registration document issued by the child's birth State. This is the case, for example, in Ukraine[12] and in India.[13] Children born through ICS in Ukraine are not able to acquire Ukrainian nationality,[14] and in India such children are usually precluded from acquiring Indian nationality on the basis of their birth through ICS to foreign 'commissioning parents'.[15]

The second part of the recipe leading to child statelessness in this scenario is that the 'commissioning parents'' State of nationality takes the position that the child is not one of its nationals either. This may be because the 'commissioning parents'' State of nationality confers nationality on the basis of *jus soli* or places limitations on the transfer of nationality to children born abroad, and/or because the national law of the 'commissioning parent's' State of

12 Ukrainian law views the commissioning parents as the child's legal parents in surrogacy situations. See, Family Code of Ukraine 2004, Art. 123(2) and 139(2).

13 Indian Council of Medical Research and National Academy of Medical Sciences, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005, para. 3.5.4 states that "the birth certificate shall be in the name of the genetic parents". However, the National Guidelines do not have binding force of law in India.

14 Law on Citizenship of Ukraine 2001, Art. 7 states that "a person, whose parents or one of the parents were citizens of Ukraine at the time of his/her birth is a citizen of Ukraine". When combined with the provisions of the Family Code of Ukraine 2004, *supra* n 12, this means children born through ICS in Ukraine are unable to acquire Ukrainian nationality as they are not viewed as having a Ukrainian parent.

15 This has been the clear position taken by the Indian Government, e.g. in proceedings in the on-going case Supreme Court of India, Civil Appeal No. 8714, *Union of India and ANR v. Jan Balaz and others*, 2010. However, it is worth noting the wording of India's Citizenship Act 1955 section 3(c), which states that every person born in India shall be a citizen of India by birth where "(i) both of his parents are citizens of India; or (ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth". Smerdon, *supra* n9, p. 345 observes that "the law remains unclear as to whether a child born to an Indian surrogate is a citizen of India".

nationality (and/or residence) concerning the status of children views the child's surrogate and her partner (if she has one) as the child's legal parent(s).

A number of cases illustrate scenario two. A leading case is that of the Balaz twins who were born in India to an Indian surrogate mother on 4 January 2008 and were stateless from birth.[16] The twins are the genetic children of their 'commissioning father', Jan Balaz, and an anonymous third-party Indian egg donor.[17] Their 'commissioning mother', Susannne Lohle (married to Mr Balaz) is not genetically related to the twins. Mr Balaz and Ms Lohle are both German citizens, and initially sought to gain German visas for the twins to enter Germany, but the applications were rejected.[18] Subsequently these 'commissioning parents' sought Indian citizenship for the twins. However, India viewed the 'commissioning parents' as the twins' legal parents; without an Indian citizen parent they were unable to acquire Indian nationality.

Almost two years after the twins' birth, the High Court of Gujarat ruled that because the twins were born in India to an Indian surrogate mother, they could be regarded as having one Indian citizen parent and were entitled to Indian citizenship under section 3(1)(c)(ii) of the Citizenship Act.[19] The Court further held the twins were entitled to Indian passports, as denying them passports would not fall within the grounds of refusal of passports under the Indian Passports Act.[20] However, the twins' statelessness persisted because the Indian government continued to take the position in subsequent Supreme Court proceedings that the 'commissioning parents' were the legal parents and therefore the twins could not acquire Indian nationality.[21] Following protracted attempts by the 'commissioning parents' to leave India with the twins (during which time the German government took a hard-line approach, in line with the German prohibition on surrogacy),[22] an *ad hoc* solution was

16 High Court of Gujarat at Ahmemebad, Letters Patent Appeal No. 2151, 2009 in Special Civil Application No. 3020, 2008 with Civil Application No. 11364 Of 2009 in Letters Patent Appeal No. 2151, 2009 with Special Civil Application No. 3020, 2009, *Jan Balaz v. Anand Municipality and ANR,* 2009, para. 3.

17 *Ibid.*, para. 2.

18 As surrogacy is illegal in Germany: Embryonenschutzgesetz 1990 (Act on the Protection of Embryos, Germany), section (1)(1)(7).

19 *Jan Balaz v. Anand Municipality and ANR*, *supra* n16, para. 17.

20 *Ibid., para.* 17-18. In para. 22, the Court held that "[w]e, in the present legal frame-work, have no other go [sic] but to hold that the babies born in India to the gestational surrogate are citizens of this country and therefore, entitled to get the passports".

21 Smerdon, *supra* n9, p. 347.

22 See, e.g. the comments of the then German Ambassador to India, Thomas Mataussek in K. Schoch, Deutschland verweigert indischer Leihmutter die Einreise, Sudwest Presse, 4 March 2010, http://www.swp.de/ulm/nachrichten/politik/Deutschlandverweigert-indischer-Leihmutter-dieEinreise;art4306,389187 See also the comment by Ambassador Mataussek regarding the possibility of granting the twins a German entry visa: "We have to be very careful. We don't want to set a precedent […] We don't want to encourage people to go down this path. This is not the way to put children into the world." Reported in R. Bhat-

reached, enabling the intercountry adoption of the twins by the 'commissioning parents'.[23] Exit documentation was then issued by the Indian government, along with a one-off German entry visa.[24]

Three other cases similar in nature to the Balaz case and falling under scenario two demonstrate the contexts in which measures are needed to avoid statelessness in ICS. The Volden twins were stateless from their birth in India on 24 January 2010,[25] resulting from an ICS arrangement commissioned by a single Norwegian woman using an anonymous Danish sperm donor and anonymous Indian egg donor.[26] They remained stateless in India for over a year given the Indian position on legal parentage and nationality in ICS, combined with the Norwegian legal position that the twins were not Norwegian nationals given their birth to an Indian mother in India[27] and the fact that surrogacy is not permitted in Norway.[28] It was not until 15 March 2011 that Norwegian immigration authorities decided, on an exceptional basis, that they could enter and reside in Norway.[29] In May 2011 a Norwegian court granted the twins' 'commissioning mother' guardianship of the twins, including financial and legal responsibility, but did not recognise her as the twins' legal mother. As a result the twins did not acquire nationality at this point and therefore remained stateless in Norway.[30] The case of *X and Y (Foreign*

nagar, Germany might consider visas for surrogate twins, DNA India News, 5 January 2010, http://www.dnaindia.com/india/report-germany-might-consider-visas-for-surrogate-twins-1331021.

23 A. Malhotra and R. Malhotra, "All Aboard For the Fertility Express", Commonwealth Law Bulletin 2012, Vol. 38(1), p. 33.

24 Smerdon, *supra* n9, p. 351 If the twins' intercountry adoption was fully concluded, it can be assumed the twins acquired German nationality through this process; however, no evidence is publicly available confirming that this occurred. Proceedings in the Supreme Court of India remain pending in this case, with the Court yet to rule on the substantive issue of the acquisition of a nationality by children born through ICS in India: http://supremecourtofindia.nic.in/clist_bm/2012/bm_dl25022015.pdf, case 101.

25 S. Lysvold et al., Kari Ann Volden får komme hjem, Norsk rikskringkasting (NRK), 16 April 2011, http://www.nrk.no/nordland/kari-ann-volden-far-komme-hjem-1.7596488.

26 D. Deomampo, "Defining Parents, Making Citizens: Nationality and Citizenship in Transnational Surrogacy", Medical Anthropology 2014, Vol. 34(3), p. 14, n. 5.

27 M. Melhuus, Problems of Conception: Issues of Law, Biotechnology, Individuals and Kinship, Berghahn Books 2012, p. 84. Norway regarded the twins' Indian birth mother as their legal mother, applying Norway's Children Act 1981 (Act No. 7 of 8 April 1981), section 2. Also relevant is Norway's Act on Biotechnology 2003 (Act No. 100 of 5 December 2003), sections 2-15, the effect of which is that it is prohibited to implant embryos into a woman other than the egg donor herself.

28 See Norwegian Government, Surrogacy, 23 January 2015, https://www.regjeringen.no/en/topics/families-and-children/innsiktsartikler/surrogate-maternity/id660199.

29 Lysvold et al., *supra* n25.

30 B. Johansen and B.M. Pettersen, Volden får beholde tvillingene, NRK, 7 May 2011, http://www.nrk.no/nordland/volden-far-beholde-tvillingene-1.7622605. It remains unreported whether or not the twins were adopted or acquired Norwegian nationality.

Surrogacy)[31] concerned twins born stateless in Ukraine, commissioned by British 'commissioning parents' using the 'commissioning father's' sperm and anonymous donor eggs.[32] The twins' statelessness occurred given the application and subsequent conflict of the Ukrainian and UK legal regimes relating to surrogacy and nationality.[33] UK law viewed the twins as Ukrainian nationals with their legal parents being their birth mother and her partner,[34] while Ukrainian law stipulates that children born through surrogacy in Ukraine are the legal children of their 'commissioning parents' and therefore not entitled to Ukrainian nationality.[35] The twins were only able to leave Ukraine and enter the UK due to the UK granting them discretionary leave to enter for one year under exceptional circumstances following DNA tests proving the existence of a genetic link between the twins and their 'commissioning father',[36] however, even once the twins had entered the UK and their 'commissioning parents'' had been granted a parental order under UK law, they remained stateless.[37] Finally in relation to scenario two, Samuel Ghilain was born in Ukraine on 28 November 2008[38] through an ICS arrangement commissioned by a Belgian same-sex couple using the sperm of one 'commissioning father' and anonymous donor eggs.[39] Given the application of Belgian and Ukrainian laws, Samuel was born stateless,[40] stranded in Ukraine for over

31 UK High Court of Justice Family Division, Case No. FD08P01466, *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

32 *Ibid.*, para. 4.

33 E. Nelson, "Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy", The Journal of Law, Medicine and Ethics 2013, Vol. 41(1), p. 246; L. Theis, N. Gamble and L. Gheavaert, "Re X and Y (Foreign Surrogacy): 'A Trek Through a Thorn Forest'", Family Law, March 2009, p. 239.

34 UK, Human Fertilisation and Embryology Act 1990, 1990 c. 37, section 27 defines the mother as "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs".

35 Mr. Justice Hedley was explicit about the twins' statelessness, summarising the effect of the application of these conflicting laws to the twins as meaning that they "were effectively legal orphans and, more seriously, stateless". *X & Y (Foreign Surrogacy)*, *supra* n31, para. 9.

36 *Ibid.,* para. 10.

37 Mr Justice Hedley noted that "the grant of a parental order does not of itself confer citizenship although the evidence suggests that it is very unlikely to be denied if sought." *Ibid*.

38 Associated Press, Baby, stranded in Ukraine, to join Belgian parents, Fox News, 21 February 2011, http://www.foxnews.com/world/2011/02/21/baby-stranded-ukraine-join-belgian-parents-1916799428.

39 I.G. Cohen, Patients with Passports: Medical Tourism, Law and Ethics, Oxford University Press 2014, p. 376.

40 T. Lin, "Born Lost: Stateless Children in International Surrogacy Arrangements", Cardozo Journal of International and Comparative Law 2013, Vol. 21, p. 547 explains "Because Belgian law is silent on the legality of surrogacy, the Belgian government denied Samuel citizenship on the grounds that it had no legal basis to recognise the Ukrainian birth certificate, despite the fact that Samuel's biological father is a Belgian citizen. Samuel also could not be a Ukrainian citizen because Ukrainian law recognises the intended parents as the child's legal parents."

two years, finally acquiring Belgian nationality after protracted legal proceedings.[41]

2.2.3 Scenario three: Children abandoned by commissioning parents

The third scenario whereby children conceived and born through ICS are stateless is when they are abandoned in their birth State by their 'commissioning parents'. In this scenario, ICS arrangements are not completed due to 'commissioning parent(s)' deciding they do not want to parent the child they commissioned. Abandonment may occur either during the pregnancy or following the child's birth. If a child is abandoned by their 'commissioning parents' following birth in a State where they are unable to acquire nationality due to nationality laws based on *jus sanguinis* and the view that the 'commissioning parents' are the child's legal parents, they are likely stateless and parentless.

Examples of this third scenario of child statelessness in ICS are more difficult to detect than those falling under scenario two, given that without 'commissioning parents' involved, they may be less likely to come before national courts for resolution; moreover, cases falling under scenario three may not come to the attention of the authorities in either the child's State of birth or the 'commissioning parents'' State of nationality and/or residence at all. However, one case reported by the media involved a child abandoned in India by Australian 'commissioning parents'. In this case, following the birth of twins – a boy and a girl – their 'commissioning parents' decided they only wanted to take the girl home to Australia. As they already had a son, the girl would complete their family and they could not afford to support both the twins.[42] The Australian government warned the 'commissioning parents' that the boy could be left stateless if they did not apply for Australian citizenship for him[43] (given the application and effect of Indian and Australian laws concerning nationality and parentage in ICS situations). However, the 'com-

41 D. Melvin, Boy stuck 2 years in Ukraine arrives in Belgium, The Washington Post, 26 February 2011, http://www.washingtonpost.com/wpdyn/content/article/2011/02/26/AR2011022601088.html. The Brussels Court of First Instance formally recognised the genetic link between Samuel and one of his 'commissioning fathers', see ,C. Kindregan and D. White, "International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements", Suffolk Transnational Law Review 2013, Vol. 36(3), p. 617. The Belgian government complied with the judgment, granting Samuel a passport, see, Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation, Steven Vanackere – surrogate motherhood, 18 February 2011, http://diplomatie.belgium.be/en/Newsroom/news/press_releases/foreign_affairs/2011/02/ni_1802110_vanackere_surrogate_motherhood.

42 J. Ireland, Fresh surrogacy concerns over boy abandoned in India, Sydney Morning Herald, 14 April 2015, http://www.smh.com.au/federal-politics/political-news/fresh-surrogacy-concerns-over-boy-abandoned-in-india-20150414-1mjyj3.html.

43 *Ibid.*

missioning parents' took no such action and the boy was left stateless and parentless in India.[44]

2.3 Key findings distilled from the three ICS child statelessness scenarios and associated cases

The three scenarios and associated cases discussed above highlight the contexts within which child statelessness can arise in ICS. They show that children conceived and born through ICS may face difficulties securing a nationality following birth in a number of ways which connect to gaps and conflicts in national laws in ICS supply and demand States relating to legal parentage and nationality and the available modes of nationality acquisition. Indeed, child statelessness in ICS is often linked to challenges faced by the child regarding legal recognition of their parentage. The cases discussed show that when a conflict between parentage laws of the various States involved in an ICS arrangement occurs, the child is likely to be without legal parentage for a time. This in turn impacts on children's ability to acquire a nationality if they are born in a State which does not allow nationality acquisition by *jus soli*. However, the cases also highlight that even if legal parentage is established in ICS cases, this does not automatically lead to nationality for the child. Therefore, while there are strong connections between parentage and nationality issues in ICS cases, legal recognition of parentage does not always lead to a child gaining nationality.

The scenarios discussed illustrate the non-existence in many jurisdictions of domestic legislation and policy explicitly designed to apply to ICS situations. In the majority of States, no national laws have been adopted explicitly addressing ICS situations, including issues such as the child's nationality when conceived and born through ICS. Therefore, many States are attempting to fill a legal vacuum by applying domestic laws which legislators did not envisage applying to ICS situations. The three scenarios also bring into sharp relief the gaps at the international level regarding ICS. No international law explicitly addresses or regulates ICS, and to date no international agreements have been reached between States regarding the practice.

The cases are further significant given that they are representative of the reality that when statelessness occurs in ICS situations, it occurs from birth. As de Groot observes, birth is a key moment for children regarding nationality: "[t]he pivotal juncture in guaranteeing a person's right to a nationality is the moment of birth. If a child does not secure a nationality at birth, he or she

44 S. Hawley, S. Smith and M. McKinnon, India surrogacy case: Documents show New South Wales couple abandoned baby boy despite warnings, ABC News, 13 April 2015, http://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206.

may be left stateless for many years, or even a lifetime – with severe consequences."[45] The cases also highlight the wide range of factual variances in ICS situations: no ICS arrangement is exactly the same as another, given factors such as the States involved and therefore which national laws apply, whether or not the States have clear positions on nationality of children in ICS, and the status of the 'commissioning parents' both in relation to each other (heterosexual married; heterosexual unmarried; same-sex) and whether or not a commissioning parent shares a genetic link with the child.

2.3.1 Examining the wider child rights impacts of child statelessness in ICS

Significant findings relating to the wider child rights impacts of statelessness in ICS can be identified based on the outcomes in the cases discussed above. The first is that in all the cases, the actions taken by the States involved were inconsistent with the principle of the best interests of the child. Moreover, in all the cases, the children were arguably discriminated against on the basis of their birth status tied to their birth through ICS given (in many instances) the uncertain nature of ICS under national law, with this status being the basis for decisions leading to their statelessness.

A further finding regarding the child rights consequences highlighted by these cases is that nationality is important to access many of other rights guaranteed to all children by the CRC given the interlocking and interdependent nature of rights. As de Groot notes, "Childhood statelessness threatens access to education, an adequate standard of living, social assistance, health care and other specific forms of protection to which children are entitled".[46] As a result of their statelessness, the children's freedom of movement outside their State of birth was restricted in all the cases discussed. Statelessness also meant all of the children had a highly uncertain legal status (in some cases for years), and were unable to gain social security and the State support services that they would have been entitled to from their birth State if they were recognised as nationals. Mr Justice Hedley noted in the case of *X and Y (Foreign Surrogacy)* that "the children had no rights of residence in or citizenship of the Ukraine and there was no obligation owed them by the state other than to accommodate them as an act of basic humanity in a state orphanage".[47]

Another result of statelessness in ICS evident in the cases discussed is that this sometimes leads to the children being separated from their 'commissioning parents' and prevented from having a relationship with the very people who are often the only adults wanting to parent the children. The Balaz twins were

45 G.R. de Groot, "Children, their right to a nationality and child statelessness", in A. Edwards and L. van Waas (eds), Nationality and Statelessness under International Law, Cambridge University Press 2014, p. 144.

46 *Ibid.*

47 *X & Y (Foreign Surrogacy), supra* n31, para. 8.

separated from their 'commissioning mother'[48] and in the judgment of *X and Y (Foreign Surrogacy)* it was observed that the twins "were marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home".[49] Both Samuel Ghilain's 'commissioning parents' were unable to remain in Ukraine, and he was initially placed with a foster family. Later, when they were unable to continue to finance this care he was placed in an orphanage for a year.[50] If we are to view the child's 'commissioning parents' as the child's parents, being separated in this way impacts on the child's right under Article 7 of the CRC to know and be cared for by his or her parents as far as possible.

A final child rights impact illustrated by the cases discussed is that such children are at risk of being trafficked or becoming the subject of illegal cross-border movement. While the risk from third parties should not be underestimated, in several cases 'commissioning parents' themselves have taken desperate measures in their attempts to secure the child's exit from their birth State and entry into their intended State of residence. Samuel Ghilain's 'commissioning parents' made a (failed) attempt to smuggle him out of Ukraine in March 2010[51] and the Volden twins' 'commissioning mother' falsified an adoption application to the Norwegian government.[52]

The fact that children are stateless as a result of their birth through ICS means that their rights under international law are being breached; the next section focuses on the standards and norms under international law governing the child's right to acquire a nationality, which help inform how we can secure the child's right to nationality in ICS.

48 Relief for German surrogate twins, The Times of India, 17 March 2010, http://www.timesnow.tv/Relief-for-German-surrogate-twins/articleshow/4340782.cms. While it is unclear why the twins' 'commissioning mother' did not stay in India with them, the practical reality in such situations is that financially it may be untenable to remain away from home and work for extended periods of time, or travel visas to remain in the child's State of birth may expire.

49 *X & Y (Foreign Surrogacy), supra* n8, para. 10.

50 Baby, stranded in Ukraine, to join Belgian parents, *supra* n38.

51 *Ibid.* The abduction or trafficking of children is prohibited under international law see, e.g. CRC, *supra* n1, Art. 36.

52 C. Kroløkke, "From India with Love: Troublesome Citizens of Fertility Travel", Cultural Politics 2012, Vol. 8(2), p. 318.

3 INTERNATIONAL LAW GOVERNING THE CHILD'S RIGHT TO ACQUIRE A NATIONALITY

3.1 General nationality provisions and nationality provisions pertaining specifically to children

Article 15(1) of the Universal Declaration of Human Rights (UDHR)[53] establishes the right to nationality as a universal right; Article 15(2) further states that no one shall be arbitrarily deprived of nationality. Subsequent international human rights law instruments have confirmed and elaborated on Article 15 of the UDHR with specific reference to children. Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) asserts that "every child has the right to acquire a nationality";[54] Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that "Each child of a migrant worker shall have the right to […] a nationality".[55] Regional human rights instruments also recognise the right of the child to a nationality, with the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child guaranteeing nationality to children on a *jus soli* basis where they would otherwise be stateless.[56]

The CRC also addresses the child's right to nationality. Article 7(1) restates the right of the child to acquire a nationality, alongside the right to, as far as possible, know and be cared for by his or her parents, and stipulates that the child "shall be registered immediately after birth". Importantly, Article 7(2) is directed towards guarding against statelessness, requiring States Parties to "ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless".

Two of the central principles of the CRC are important to note regarding the child's right to nationality insofar as they colour how the child's rights should be interpreted and implemented. Article 2 establishes the principle

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53 Universal Declaration of Human Rights, 10 December 1948, Adopted and proclaimed by General Assembly resolution 217 A (III), Art. 15.

54 International Covenant on Civil and Political Rights, 16 December 1966, entry into force 23 March 1976, 999 UNTS 171, Art. 24(3).

55 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, entry into force 1 July 3002, A/RES/45/158, Art. 29.

56 American Convention on Human Rights, 22 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36, Art. 20; African Charter on the Rights and Welfare of the Child, 11 July 1990, entry into force 229 November 1999, OA DOC. CAB/LEG/24.9.49, Art. 4 and 6(3). In Europe, European Convention on Nationality, 6 November 1997, entry into force 1 March 2000, ETS 166, Art. 6(2) requires States Parties to provide under their domestic law for nationality to be acquired by children born on its territory who do not acquire another nationality at birth.

of non-discrimination, with the inclusion of 'birth or other status' in Article 2(1) providing scope for the application of this provision to ICS situations. The 'best interests of the child' principle enshrined in Article 3(1) of the CRC, establishes that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". De Groot notes that "the almost universal ratification of the CRC suggests that an otherwise stateless child should acquire the nationality of the country of birth immediately at birth or as soon as possible thereafter".[57] This is also reflected in the Dakar Conclusions which are based on the idea that from the moment of their birth it will never be in the child's best interests to be stateless given the adverse associated consequences.[58] Applying the principle of the best interests of the child to children seeking to acquire nationality in ICS when they would otherwise be stateless means that in making decisions regarding whether or not a child can acquire a particular nationality, the best interests of the child should be a primary consideration.[59]

3.2 Key provisions in the Statelessness Conventions

While the 1930 Hague Convention on certain questions relating to the conflict of nationality laws (1930 Hague Convention) asserts that "[i]t is for each state to determine under its own law who are its nationals"[60] and that "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State",[61] as indicated above, subsequent international human rights law instruments have imposed limits and obligations in relation to the freedom of States in this regard. A number of limits on a State's discretion in nationality matters exist, "derived either from general principles, custom or treaty obligations include: (i) the prohibition on the arbitrary deprivation of nationality; (ii) non-discrimination in nationality matters; and (iii) the duty to avoid statelessness".[62] The Convention on the Reduction of Statelessness (1961 Convention)[63] aims to give effect to the universal right to nationality and the customary norm that statelessness

57 de Groot, *supra* n45, p. 150.

58 UNHCR, Expert Meeting – Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children ('Dakar Conclusions'), September 2011, para. 5.

59 The importance of the best interests of the child to such cases was discussed by the European Court of Human Rights in *Mennesson v. France*, *supra* n3. This is discussed further in section 4.3.1 of this chapter.

60 Convention on Certain Questions Relating to the Conflict of Nationality Laws, 13 April 2013, League of Nations Treaty Series vol 179, p.89, No. 4137, Art. 1.

61 *Ibid*., Art. 2.

62 Edwards, *supra* n2, p. 25.

63 Convention on the Reduction of Statelessness, 30 August 1961, entry into force 13 December 1975, 989 UNTS 175.

should be avoided. It sets out a framework codifying the norms and standards relating to the conferral of nationality and limiting or eliminating circumstances in which the operation of national laws may result in statelessness.

The provisions of the 1961 Convention most relevant to ICS situations are those dealing with the prevention of statelessness at birth. Article 1(1) of the 1961 Convention sets out a clear primary safeguard integral to the prevention of statelessness at birth: "[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless". Applying this principle to the ICS context means that birth States of children conceived and born through ICS should, in situations where the child would otherwise be stateless, grant the child nationality. Therefore, Article 1(1) is potentially a very powerful tool in the ICS context. The 1961 Convention stipulates that such a grant of nationality can occur at birth[64] or later as a result of an application lodged on behalf of the child.[65] However, to avoid statelessness in ICS situations, ideally a grant needs to occur at or soon after the child's birth. If the child is able to leave their State of birth prior to acquiring a nationality (i.e. if the 'commissioning parents'' home State grants the child entry but not nationality), statelessness will not be avoided. States must, therefore, pay close attention to implementing the requirement under the CRC that nationality should be able to be acquired immediately after birth.

Although Article 1(1) of the 1961 Convention offers a potentially powerful mechanism to prevent statelessness in ICS situations, it is dependent on ICS supply States which are States Parties to the 1961 Convention and implementing this obligation, or on ICS supply States adopting this protection even though they are not Parties to the Convention. Currently, some of these States are not States Parties to the 1961 Convention.[66] However, Article 1(1) of the 1961 Convention should be viewed as codifying an important aspect of the customary norm that statelessness should be prevented; non-Contracting States to the 1961 Convention should be encouraged, in situations where a child would otherwise be stateless – including in ICS situations – to apply the safeguard established in Article 1(1), to implement their duty to prevent statelessness and secure the universal right to nationality. Such an approach is consistent with Articles 7(1) and 7(2) of the CRC.

Beyond the safeguard established by Article 1(1), the 1961 Convention incorporates further provisions directed at ensuring that no one falls through the cracks when it comes to nationality. Article 4(1) establishes that "[a] Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality

64 *Ibid*., Art. 1(1).

65 *Ibid.,* Art. 1(b).

66 For the current list of signatories and parties to the Convention on the Reduction of Statelessness see, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en.

of one of his parents at the time of the person's birth was that of that state". Article 1(4) codifies another relevant safeguard: "[a] Contracting State shall give its nationality to a person, otherwise stateless, who is legally precluded from assuming his/her birth nationality, where that State's nationality was held by either parent at the time of the birth". Both Article 4(1) and Article 1(4) rely on children securing the nationality of the State of one of their parents. The application of these safeguards to children who are otherwise stateless in ICS situations may therefore be problematic, since these provisions would require proof of the connection between the child and a parent in order for the child to benefit from their protection. The 1961 Convention does not envisage the possibility of a lack of clarity or agreement regarding the child's parentage through situations such as ICS; however, as discussed earlier in this chapter, when born through ICS, children may have multiple potential parents and may not be genetically related to their 'commissioning parents'. Therefore, while it is the child's 'commissioning parents' who in most ICS cases seek recognition as the child's legal parents and try to secure the child the same nationality as their own, it might be difficult to establish that the 'commissioning parents' should be recognised as the child's parents. This raises a potential hurdle to applying the safeguards of Articles 4(1) or 1(4) of the 1961 Convention to children born through ICS who are otherwise stateless.

4 Securing the Child's Right to Nationality in ICS

4.1 The limitations of the solutions applied in the cases discussed

The actions and inaction of the States involved in the cases discussed in this chapter suggest that solving statelessness and preventing it in the three scenarios discussed in section two is not currently a priority among States. This is despite the acute risk of statelessness for children conceived and born through ICS in States where they will not automatically receive nationality on the basis of *jus soli*. Solving this problem is dependent on States being willing to take steps to prevent statelessness for children born through ICS. On the supply-side of ICS, States may be hesitant to take on the perceived burden of granting nationality to children born through ICS in their territory who would otherwise be stateless, given the potential costs involved and its associated politically unpalatable nature. However, under the customary international norm that statelessness is to be avoided, all States have a responsibility to give effect to the right to nationality. In this context it should be noted that neither India nor Ukraine have a general safeguard in their nationality law ensuring the right to nationality of otherwise stateless children born in the State. India's long-awaited legislation regarding ICS continues to languish in the Indian parliamentary system, the contents of the latest draft of the Assisted Reproduct-

ive Technology (Regulation) Bill (2013) remain publically unknown.[67] However, earlier drafts have not included provisions relating to the child's nationality.

With respect to States on the demand-side of ICS, there are a number of implications for nationality policy and legislation stemming from some of the cases discussed in this chapter. However, the responses of these States to the cases do not indicate a willingness to take a prevention approach to statelessness in ICS situations.

The Committee on the Rights of the Child asked the German government to "provide measures taken by the State party to address the rights of children residing in the State party territory but whose surrogate mothers are not from the State party […] please provide information on measures to prevent children in such situations from becoming Stateless".[68] Germany responded by outlining that pursuant to Section 4(1) of the Nationality Act, children attain German citizenship by birth when one parent is a German national and that on the basis of Section 1591 of the Civil Code, the mother of a child is always the woman who bore the child; moreover Section 1592(1) establishes the child's father is the mother's husband (at the time of the child's birth). Germany said "In order to derive a claim to German citizenship from a (German) sperm donor, it is not sufficient to simply determine biological paternity by submitting a DNA analysis, parentage must be determined in the legal sense",[69] and that "Even if a child born in a foreign country to a surrogate mother generally does not attain the genetic father's (German) citizenship by birth, it is still not stateless, since as a rule, it at least attains the mother's citizenship".[70] Germany's response is problematic, failing to address the reality of the situation in the Jan Balaz case, since States such as India do not recognise the surrogate mother as the child's legal mother and therefore do not grant nationality on the basis of a *jus sanguinis* relationship with the surrogate mother, leaving the child stateless. Unfortunately, the Committee on the Rights of the Child's Concluding Observations did not follow-up on this issue.[71]

The case of the Volden twins triggered public debate in Norway regarding ICS and new family forms facilitated by ART. Human rights lawyer Gro Hillestad Thune argued that by rejecting Ms. Volden's adoption application Norway

67 A. Malhotra, Ending discrimination in surrogacy laws, The Hindu, 3 May 2014, http://www.thehindu.com/opinion/op-ed/ending-discrimination-in-surrogacy-laws/article5970609.ece. The most recent publicly available version of Bill is the 2010 version: http://icmr.nic.in/guide/ART REGULATION Draft Bill1.pdf.

68 Committee on the Rights of the Child, List of issues in relation to the combined third and fourth periodic reports of Germany, 23 December 2013, CRC/C/DEU/3-4, para. 7.

69 Committee on the Rights of the Child, List of issues in relation to the third and fourth periodic reports of Germany: Addendum, Replies of Germany to the list of issues, 23 December 2013, CRC/C/DEU/Q/3-4/Add.1, para. 43.

70 *Ibid.*, para. 45.

71 Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Germany, 25 February 2014, CRC/C/DEU/CO/3-4.

had inflicted statelessness on the twins, in breach of international law.[72] She further criticised the government for attaching little weight to the children's rights and interests, noting that the children themselves did not ask to be born.[73] However, Budfir (Norwegian Directorate of Child Welfare and Adoption) said because of the commercial nature of the surrogacy arrangement, it fell under the international definition of sale of children[74] and approving the adoption would be inconsistent with the CRC. Budfir held the view that significant public interests outweighed the interests of the twins in the case and said rejecting the adoption application would set an example discouraging other prospective 'commissioning parents' from entering into ICS arrangements. Hillestad Thune argued that Bufdir was wrong to use the CRC to justify its decision rather than using it to protect child rights; she said the balance should have led to a decision ensuring that the children were placed in a safe situation as regards their care.[75]

Despite the position taken by the Norwegian government in the Volden case, Norway subsequently passed 'provisional' (temporary) legislation dealing directly with the nationality of children born through ICS with the involvement of Norwegian 'commissioning parents'. Article 5(a) was added to the Norwegian Nationality Act,[76] which refers to a provisional law passed at the same time pertaining to transfer of legal parenthood for children born abroad to surrogate mothers.[77] Article 5(a) has the effect that children born through ICS to a Norwegian 'commissioning parent' who are residing in Norway and whose legal parenthood is transferred to a Norwegian national automatically become Norwegian nationals (if the child is under 18 years at the date of the decision on legal parenthood). However, applications for transfer of legal parenthood under the temporary parenthood legislation had to be made by 01 January 2014.[78] The effect of these laws is therefore likely to have been quite limited in practice. Olsen notes "[t]he law was passed to secure the rights of children born by surrogate mothers before a more permanent legal solution is decided by the Norwegian Parliament. It is still unclear what a more perma-

72 N.M. Smith Rustad and G. Pettersen, Mener norske myndigheter gjør tvillinger statsløse, NRK, 23 March 2011, http://www.nrk.no/fordypning/statslose-tvillinger-1.7553860.

73 *Ibid.*

74 *Ibid*. See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 25 May 2000, entry into force 18 January 2002, Article 2(a).

75 Smith Rustad and Pettersen, *supra* n72.

76 Temporary amendment to the Norwegian Nationality Act (Lov om norsk statsborgerskap (statsborgerloven)) June 10 2005, passed by the Stortinget 8 March 2013.

77 Temporary law on the transfer of parenthood for children in Norway born through a surrogate mother abroad (Midlertidig lov om overføring av foreldreskap for barn i Norge født av surrogatmor i utlandet mv), passed by the Stortinget 8 March 2013.

78 *Ibid*., Art. 4.

nent solution may look like as surrogacy is at present not legal under Norwegian law".[79]

In the UK, in the years since *X & Y (Foreign Surrogacy)*, the UK government has issued policy guidance on nationality for children in ICS situations involving British 'commissioning parents'.[80] This makes clear that "[e]ven if the surrogate mother's home country sees the commissioning couple as the 'parents' and issues documentation to this effect, UK law and the Immigration Rules will not view them as 'parents'. Only where the surrogate mother is single is there a chance of UK law viewing the sperm donor/commissioning male as the legal 'father'".[81] Therefore, even in instances where 'commissioning parents' are named on birth certificates in the child's birth State, "a baby born to a foreign national surrogate mother who is married will not be automatically eligible for British nationality".[82] The guidance outlines a number of situations and the relevant steps which can be taken for the child to acquire British nationality.[83] Some of these envisage children entering the UK while they are stateless and subsequently having their legal parentage regularised through a parental order (under section 30 of the Human Fertilisation and Embryology Act 2008), with the possibility of applying for British nationality based on this recognition of the parent-child relationship. However, in instances where the child has no genetic link to a British 'commissioning parent', the guidance states that recognition of legal parentage in the UK will not be possible;[84] the child will not be able to acquire British nationality. This means that not all children born through ICS will have the possibility of acquiring nationality.

Finally, in Belgium the resolution of Samuel Ghilain's case did not trigger a discussion of the wider implications of the case. Given that the resolution to Samuel's statelessness was a passport issued under Ministerial discretion, it remains true that "the legal and nationality status of a child born abroad

79 E.D.H. Olsen, Update on 2012 and 2013 Revisions of Norwegian Citizenship Law: Procedural issues and citizenship for infants born abroad to surrogate mothers, Citizenship News, European Union Democracy Observatory on Citizenship, 12 January 2014, http://eudo-citizenship.eu/news/citizenship-news/1030-update-on-2012-and-2013-revisions-of-norwegian-citizenship-law-procedural-issues-and-citizenship-for-infants-born-abroad-to-surrogate-mothers.

80 See U.K. Foreign and Commonwealth Office, Surrogacy Overseas, June 2014 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324487/Surrogacy_overseas__updated_June_14_.pdf and U.K. Home Office, Inter-country Surrogacy and The Immigration Rules, 1 June 2009, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261435/Intercountry-surrogacy-leaflet.pdf.

81 *Ibid.*, p. 2.

82 *Ibid.*, p. 2.

83 *Ibid.*, pp. 6-11.

84 *Ibid.*, para. 50 reads "If you know that neither of you will be able to provide any genetic material towards the creation of a child, you will not be able to commission a child under a surrogacy arrangement and then obtain a Section 30 Parental Order".

in a commercial surrogacy arrangement to a Belgian citizen is completely uncertain".[85]

4.2 Possible solutions to child statelessness in ICS

4.2.1 Jus soli based solutions

One possible solution to the challenge of securing the child's right to acquire a nationality in ICS is the implementation of the safeguard established by Article 1(1) of the 1961 Convention in conjunction with Article 7 CRC, by the birth States of such children. This means all children born through ICS in the territory of a State would acquire the nationality of that State at birth if they would otherwise be stateless, resulting in the outcome that no child is born stateless through ICS. This solution would ensure at least one State recognises the child as a national, avoiding discrimination on the basis of the child's birth status and resolving any conflict of domestic nationality laws. It would also ensure that children who have no genetic link to their 'commissioning parents' or who are abandoned by their 'commissioning parents' in ICS situations are not left without nationality as a result of their 'commissioning parents'' actions. As already indicated, to be fully effective in avoiding statelessness in ICS, this would need to be an automatic conferral of nationality at birth or soon after birth.

From a statelessness prevention perspective, this solution would mean all the instances of child statelessness in the cases discussed would have been avoided, enabling the children to secure their right to nationality under Article 7(1) CRC. Although not all States are States Parties to the 1961 Convention and therefore bound by its provisions, it is suggested that all States should implement Article 1(1) including for children born on their territory through ICS. Such a solution is consistent with the customary norm that statelessness should be avoided and that all States have a duty to give effect to the universal right to nationality.

However, there are some limitations to this first proposed solution. It centres on avoiding statelessness, and is therefore a solution founded on a safeguard rather than a positive recognition of the child's right to a nationality. More problematic is the underlying premise of all ICS arrangements that the 'commissioning parents' intend the child to reside with them. Therefore, the child's acquisition of the nationality of their birth State on a *jus soli* basis does not align with the intention upon which ICS arrangements are premised, and may have limited practical benefit and effect for children in ICS, other than preventing statelessness. Although the fact they have a nationality may enable

85 Kindregan and White, *supra* n41, p. 618.

them to gain a passport and travel to their 'commissioning parent's' State of nationality or residence, once in that State, given their foreign-national status, they may not have access in practice to social and health services, education and social security.[86] In such situations, the child will continue to be in a position of legal insecurity with consequent impact on his or her life and access to services, inconsistent with his or her best interests; ultimately, the child may not retain the right to reside in his or her 'commissioning parents'' State of nationality or residence after a certain duration or at a certain age, depending on applicable national laws.

Although this chapter has not discussed in detail the decision of the European Court of Human Rights (ECtHR) in the case of *Mennesson v. France*[87] because it did not involve child statelessness, in the search for solutions it is worth noting some key principles reflected in that judgment. The case dealt with twins who acquired US nationality at birth (as a result of the USA's *jus soli* law) but who were not recognised as nationals by France (their 'commissioning parents'' State of nationality), since surrogacy is illegal in France.[88] The Mennesson twins lived as foreign nationals in France for the first 15 years of their lives until the ECtHR decision was implemented in 2015.[89] The ECtHR found a violation of the twins' right to respect for private life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[90] Key elements of the judgment relating to the child's right to nationality and not to be stateless are:

- The child's right to identity is a central aspect of the right to respect for private life, and essential parts of this are legal parentage and nationality;[91]
- Uncertainty regarding the acquisition of the nationality of their State of residence, consistent with that of their 'commissioning parents' is likely to have a negative impact on children's ability to form their identity;[92]

86 This is what happened to the twins in the case of *Mennesson v. France* and *Labassee v. France* supra n3; the children involved in these cases were born through ICS in the USA in 2000 and 2001 and gained US nationality upon birth. However, France (their 'commissioning parent's' State of nationality) refused to register the children in France and recognise them as French nationals. The European Court of Human Rights found a violation of the children's right to respect for private life.

87 *Mennesson v. France*, *supra* n3.

88 *Ibid.,* para. 18-25.

89 For details of the implementation of the judgment by France, including the delivery of certificates of French nationality to the Mennesson twins see, http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=mennesson&StateCode=&SectionCode.

90 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, entry into force 3 September 1953, ETS 005.

91 *Mennesson v. France*, *supra* n3, para. 96-101.

92 *Ibid.,* para. 97.

- The existence of a biological (genetic) link between a child and a 'commissioning parent' is another important aspect of identity that should be recognised under law. Not to do so fails to reflect the reality of the child's situation and has a negative impact on the child's identity formation;[93] and
- The best interests of the child must be appropriately weighed and upheld.[94]

The ECtHR is clear that legal recognition of both nationality and legal parentage in the State in which children reside is likely to be in their best interests, even where surrogacy remains illegal in a given State. The ECtHR is therefore of the view that the acquisition of nationality on a *jus soli* basis is unlikely to be enough to give effect to the child's best interests under the CRC in ICS situations where the child is intended to reside and grow up in a different State.

However, it is important to recognise that this solution is likely to be consistent with the best interests of the child in instances of scenario three, where the child is abandoned by 'commissioning parents' in the State of birth either before or after birth through ICS. Given the uncertainty in scenario three situations regarding whether the 'commissioning parents' State of nationality will assume responsibility for the child's care and protection, it is likely to be in the children's best interests to acquire the nationality of the birth State, given that in the foreseeable future following their abandonment they will remain in and be reliant on that State to give effect to their rights under the CRC. Therefore, the first proposed solution – whilst having significant associated limitations – remains important to bear in mind for situations of child abandonment in ICS. It may also be relevant in situations where the child has no genetic link with the 'commissioning parents', as discussed below.

4.2.2 Jus sanguinis based solutions

An alternative approach which could overcome the limitations inherent in the first proposed solution is for the State of residence of the 'commissioning parents' (that is, the State they intend the child to live with them in) to grant the child nationality *jus sanguinis*, either pre-birth through a court order granting nationality prospectively in the event that the child is born, or after birth. This would not only result in the child being able to secure the right to a nationality, but the nationality acquired would be more aligned with best interests in terms of the child's lifetime outcomes. The acquisition of nationality *jus sanguinis* presupposes that the 'commissioning parents'' State of nationality recognises that a parent-child relationship exists between the child and at least

93 *Ibid.*, para. 100.
94 *Ibid.*, para. 99.

one of their 'commissioning parents'.[95] A pre-birth grant, contingent on the child's birth with a proven genetic link to a 'commissioning parent', is an attractive option as it would secure legal certainty for the child regarding nationality status. It has the benefit of putting the process of nationality acquisition in motion at the earliest possible stage (that is, prior to the child being born), making the acquisition of nationality a non-issue for the child once born (as long as a genetic link can be proved, so in practice, nationality would be acquired shortly after birth). However, securing the child's nationality *jus sanguinis* via a pre-birth grant contingent on a genetic link being proved post-birth may well be cumbersome to implement in practice. Additionally, this would be a completely new approach, outside the usual methods of nationality acquisition at birth.

A solution centring on a post-birth *jus sanguinis* grant of nationality may be more workable and sit more comfortably with existing legal norms regarding conferral of nationality. As previously mentioned, this has been the solution applied by some ICS demand States on an *ad hoc* basis to regularise the nationality status of children born through ICS in a foreign territory but who have entered and reside in their State. The Council of Europe (CoE) has also suggested this to avoid statelessness in international surrogacy.[96] Principle 12 of CoE Recommendation CM/Rec(2009)13 proposes that "[i]f the child-parent family relationship is recognised in the state of nationality of the commissioning mother or father the provisions of that state on the acquisition of nationality *jure sanguinis* have to be applicable. The child will be fully integrated into the family of the 'commissioning parents', which justifies – as in the case of adopted children – the acquisition of the nationality of the parents."[97]

However, Principle 12 does not go as far as ensuring that all children born through ICS will have the right to a nationality on a *jus sanguinis* basis. The CoE states that "[i]t should be stressed, however, that principle 12 does not oblige the recognition of the child-parent relationship as an automatic consequence of the use of surrogacy. Whether such recognition takes place depends on the private international law and, if applicable, the domestic law of the country of the commissioning parents."[98] The fact that this is not a comprehensive safeguard is further stressed by the caveat that "[t]he principle simply

95 From a best interests of the child perspective, it remains questionable whether it will always be in the child's best interests to be in the care of their 'commissioning parents'. For example, in instances where a child's 'commissioning parent' has previous convictions for child abuse or sexual abuse, it is unlikely that a best interests of the child assessment would lead to the child remaining in their care. However, a balancing exercise will likely be necessary, especially in instances where the child is genetically related to such a person. However, this is outside the scope of this chapter.

96 Council of Europe Committee of Ministers, Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member states on the nationality of children, adopted 9 December 2009, CM/Rec(2009)13.

97 *Ibid.*, Explanatory Memorandum, para. 32.

98 *Ibid.*, para. 33.

underlines that if recognition takes place this should also have consequences in nationality law".[99]

Moreover, there are significant limitations to the efficacy of a solution based on a *jus sanguinis* mode of acquisition to the challenge of securing nationality for children in ICS. As the CoE has identified, this relies on the recognition of the 'commissioning parents' legal parentage. This raises a large problem in the ICS context, given that a blood tie will not always exist between 'commissioning parents' and the child, because of the involvement of third-party gamete or embryo donors. This puts such children without a genetic link to their 'commissioning parents' beyond the reach of a solution based on acquisition of nationality *jus sanguinis* in instances where 'commissioning parents' are not recognised as the child's legal parents in States requiring such a genetic link to be in existence in order to recognise legal parentage. Although States requiring a genetic link to at least one 'commissioning parent' in order to recognise legal parentage and nationality in ICS have not explained the rationale underpinning this requirement, one possible reason is the need to avoid the sale of children. The strict genetic link requirement of some States exposes the limitations of such a *jus sanguinis* solution to avoiding child statelessness in ICS. For children born through ICS, nationality acquisition contingent on legal parentage will not be feasible in all cases, given the complexities arising from the multiple possible 'parents' involved, and the inability to guarantee a blood tie/genetic link between at least one 'commissioning parent' and the child. Furthermore, single female 'commissioning parents' or same-sex female 'commissioning parents' may in some instances be unable to confer nationality by descent on the child even if they have a genetic connection, given the discriminatory nature of some States' nationality laws.

In situations where nationality is acquired *jus sanguinis* either pre- or post-birth, in practical terms it may be some days or weeks after a child is born before the acquisition of nationality can be confirmed, given that States may require proof of a genetic link through DNA testing in ICS situations. Furthermore, it is important to recognise that a post-birth grant of nationality *jus sanguinis* after the child has already entered and is residing in the 'commissioning parents'' State of nationality and/or residence does not resolve the problem that in order to have entered and be residing in that State, the child may have had to secure an entry permit or a visa for that State, which may be time-limited. An exit permit may also be required from the child's birth State.

99 *Ibid.*

4.2.3 *A practical and effective solution and residual secondary safeguards to secure the child's right to nationality in* ICS

The above discussion highlights that it is difficult to find a solution centring on a positive obligation to ensure a child's right to acquire a nationality. Acquisition of nationality *jus soli* has the advantage of securing the child's right to a nationality from birth, thereby preventing children born through ICS being stateless at birth. Beyond this, however, having secured the nationality of their birth State may have little practical benefit for children who reside in their 'commissioning parents'' State of nationality, since as foreign nationals they will remain without the full protection flowing from nationality of that State. It may not align with what is in the child's wider best interests, in terms of giving effect to rights under the CRC and safeguarding lifetime outcomes. Indeed, as the *Mennesson v. France* illustrates, significant issues around the child's identity may remain. However, acquisition of nationality *jus sanguinis* is dependent on recognition of the 'commissioning parents'' legal parentage. Although this solution is likely to be more consistent with the best interests of the child, the weakness of a *jus sanguinis* approach to securing the child's nationality in ICS is that recognition of 'commissioning parents' as legal parents is far from guaranteed, for example due to the lack of a genetic link between the child and one or both of the 'commissioning parents'.

On the basis of the preceding discussion of possible solutions to secure nationality for children born through ICS who would otherwise be stateless, the optimum solution is one which not only guarantees the right to a nationality, but also avoids discrimination on the basis of birth status and aligns with and gives effect to the best interests of the child. On balance, nationality acquisition based on a *jus sanguinis* approach is preferred in the context of ICS. This could be undertaken on a pre-birth or post-birth basis; however, the ultimate aim should be to ensure that the child secures nationality as soon as possible following birth, thereby limiting the time during which the child's nationality is uncertain.

As the optimum solution outlined above will not secure nationality for all children in ICS (where a genetic link does not exist with 'commissioning parents' or the child is abandoned by 'commissioning parents'), implementing additional safeguards is necessary to avoid child statelessness in ICS. In such situations, birth States should apply the principle codified in Article 1(1) of the 1961 Convention to ensure that otherwise stateless children born in their territory through ICS acquire nationality. For this group of ICS children, this mode of nationality acquisition is most likely to be consistent with their best interests as it will mean they are not stateless, even though the acquisition of nationality will not necessarily have the effect of resolving other aspects of their situation. For children without a genetic link to their 'commissioning parents', this will mean they have a nationality, but it will not necessarily lead to resolution of the question of their legal parentage. For abandoned children,

applying this solution will mean they are recognised as nationals of the State they are likely to remain in, even if their wider legal status in terms of guardianship remains uncertain.

Given the gaps in international guidance and the need for cooperation between States in the context of ICS,, an international agreement would be helpful in ensuring that safeguards are in place in all States. An instrument or guidance developed under the auspices of an international organisation with global reach in the area of nationality and statelessness would provide a useful starting point, as it would provide States with information on how to approach ICS situations to ensure that statelessness is avoided and the best interests of the child are protected. Such an instrument or guidance document should reflect and re-assert the pre-existing international law norms codified in the 1961 Convention and the CRC. Eventually it may be useful for States to negotiate a legally binding agreement, which and could for example take the form of a protocol to the 1961 Convention. However, in the first instance any new tools to address the problem of statelessness in ICS need to be simple and flexible enough to encourage as many States as possible to take action to prevent children from being born stateless through ICS. The development of non-legally binding guidance could thus provide a useful initial roadmap for States to follow in ICS situations where they are faced with children who would otherwise be stateless.

In light of these observations, UNCHR may wish to consider the possibility of issuing guidance on securing nationality for all children in international surrogacy situations so as to avoid childhood statelessness. This would help to shine a spotlight on child statelessness as a particular problem within ICS and to identify ways in which problems can be avoided. This could happen in the short-term without having to wait for long-term international agreement on the broader practice of ICS (a matter more suited to the mandate of the work of the Experts Group relating to international surrogacy convened by the Hague Conference on Private International Law[100]). Ideally, UNHCR would prepare and issue this guidance in cooperation with the Committee on the Rights of the Child, as this would send a strong message to States regarding the need to take cooperative, targeted action to solve the problem of child statelessness in ICS. Such guidance should rest on the principle of shared State responsibility and encourage States to cooperate to ensure that all children born through ICS can secure a nationality, consistent with their right under Article 7(1) of the CRC. Substantively, it is suggested the guidance reflect the following:

1) A State which is the intended State of a child's residence will, either prior to the birth of that child through ICS or as soon as possible following birth, grant nationality to the child if he or she would otherwise be stateless, as

100 See, https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy.

long as a genetic link between the child and one of his or her 'commissioning parents' is proved.

1(1) In order to ensure that the child is able to acquire nationality as soon as possible after birth through ICS, DNA testing will be made available immediately following the child's birth.

2) States will grant nationality to an otherwise stateless child born on their territory through ICS. The child should be assumed to be stateless if he or she:
   a. has no genetic link to either of their 'commissioning parents' on the basis of DNA testing; or
   b. is abandoned pre- or post-birth by their 'commissioning parents' in the territory of the birth State, regardless of whether or not he or she has a genetic link to his or her 'commissioning parents'.

Guidance of this kind can function perfectly well despite the current absence of international agreement on the legality or illegality of ICS. Currently, given the wide divergence of views among States regarding the practice of ICS, achieving consensus on this issue itself remains extremely challenging. However, as children continue to be conceived and born through ICS, this lack of consensus on the practice of ICS itself should not hinder States from cooperating to solve the particular problem of child statelessness, consistent with international principles concerning the right to nationality and the importance of avoiding statelessness.

5 Conclusion: the future of the child's right to acquire a nationality in ICS

This chapter has provided an overview of the problem of child statelessness in the context of ICS and the challenges associated with securing the child's right to acquire a nationality in this setting. ICS has emerged as a new cause of statelessness at a time when the international community is seeking to galvanise around the goal of eradicating statelessness by 2024. Statelessness has a negative impact on children's ability to access other human rights and thus diminishes their chances for better futures.[101] However, the push and pull factors drawing 'commissioning parents' to engage in ICS in situations leading to child statelessness remain, and the conception and birth of children through ICS in is unlikely to end anytime soon.

Despite the considerable complexities involved, children do not need to be born stateless in ICS. The solutions proposed in this chapter provide an approach to addressing the challenge of ensuring the right to acquire a nation-

101 United Nations Secretary General, Guidance Note of the Secretary-General: The United Nations and Statelessness, June 2011 http://www.refworld.org/pdfid/4e11d5092.pdf, p. 2.

ality is secured for every child born through ICS. Such an approach is consistent with the objective that no child should be born stateless and, as Boll observes, "a grant of nationality has important practical as well as emotional consequences for the individual".[102] While the proposed solutions rely on States prioritising the rights of children born through ICS, they are intended to be practical and achievable, without States needing to make comprehensive changes to their nationality and parentage laws. If applied to the cases of child statelessness in ICS discussed in this chapter, statelessness would have been prevented in all instances. Implementation of the guidance outlined in this chapter would ameliorate the vulnerability of such children by providing a degree of certainty as regards acquisition of nationality, drawing on the framework provided by international human rights law. This would enable the child to establish the nationality element of their identity, and will facilitate access to other rights.

In the long-term, States should consider the harmonisation of national laws and policies regarding the nationality of children born through ICS. Harmonisation on an international scale in this regard would be a complex and challenging task. It must be informed by the principle of the best interests of the child and the right of every child to acquire a nationality. Any development of an international agreement addressing or regulating ICS (which is certainly desirable if a comprehensive solution to the problems arising from ICS is to be found) will need to grapple with larger questions concerning whether forming families through the practice of ICS is consistent with international human rights standards and norms, States' policy preferences and whether and to what extent States are willing to facilitate ICS. Given that such discussions could take years, if not decades, it's important that action be taken sooner, ideally by UNHCR and the CRC in concert, to at least provide States with guidance about practical steps to prevent children being born stateless in ICS.

102 A.M. Boll, Multiple Nationality and International Law, Brill 2007, p. 11.

8 Answering the "Who am I?" Question

Protecting the Right of Children Born Through International Commercial Surrogacy to Preserve Their Identity Under Article 8 of the United Nations Convention on the Rights of the Child

Abstract

This Chapter deals with the child's right to identity preservation as established by Article 8 CRC, in the context of ICS. Like the child's right to nationality, the right to identity preservation is one of the child's rights most at risk in ICS and is at the heart of the child rights challenges arising through ICS, given the wider impact identity has on the child's lifetime outcomes. Although nationality is an element of identity, it is just one of many elements in this respect. This Chapter identifies other elements of child identity endangered in ICS, as well as examining why identity preservation is so important in the ICS context. This discussion is grounded in Article 8 CRC, regional human rights jurisprudence, and draws on lessons from adoption, donor-conception and domestic surrogacy. This Chapter therefore provides the closest examination yet of the child's identity preservation right in ICS situations. Measures are proposed to implement Article 8, to be undertaken by states and other key actors in ICS. It is made clear that unless these are actioned, children born through ICS may never be able to answer the fundamental question of 'Who am I?', leaving them in a position contrary to their rights under international human rights law, in particular, the CRC.

Main Findings

- The elements of a child's identity are not limited to those explicitly mentioned in Article 8(1) CRC. As demonstrated through relevant jurisprudence, as well as nationality, the genetic and biological, personal narrative, and cultural elements of the child's identity are particularly at risk in ICS.
- Key lessons from donor-conception, adoption and domestic surrogacy indicate that in the context of ICS, it is crucial that identity information is collected and preserved on behalf of children conceived and born through ICS, and that such children are made aware of the existence of that identity information and have access to it in line with their evolving capacities.
- Commissioning parents have a significant first-line-of-defence role to play in upholding the child's Article 8 right in ICS, given that they can make

decisions in the preconception, prenatal and post-birth stages of ICS consistent with safeguarding the child's rights and best interests.
- Medical professionals also occupy a powerful position regarding the safeguarding of the child's Article 8 right in ICS. Most significantly, in order to protect the future child's identity preservation right, only identifiable gamete donors and surrogate mothers (both who are willing to be contacted by a future child) should be permitted to be involved in ICS arrangements.
- CRC States Parties should take care to protect and promote the right to identity preservation for children conceived and born through ICS. A practical way that States can do so is by facilitating the compilation and provision of an identity dossier for children born through ICS; longer-term, an inter-state cooperation system of identity protection would give children born through ICS the best chance of having their identity preservation right effectively protected.

Contextual notes

- Children are continuing to be born through ICS, including through the use of anonymous donor gametes, and in some instances, the involvement of anonymous surrogate mothers; as long as ICS continues to be practised in ways that do not seek to protect the child's right to identity preservation, the issues raised in this Chapter will persist.

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1 Introduction

The birth of children through international commercial surrogacy (ICS) has developed over the last decade as a distinctly twenty-first century phenomenon.[1] It presents challenges to human rights and to the concept of 'family'. Particular challenges exist to the rights of the child conceived and born as a

1 For the purposes of this paper, International Commercial Surrogacy is the practice involving the conception and birth of a child intended for a person or persons (commissioning parents) in one state (demand state) but born in another state (supply state) to a surrogate mother. In all instances ICS involves a transfer of money between some of the parties involved. The child may or may not be genetically related to one or both of the commissioning parents or to the surrogate. For further background context on ICS, see Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements,* Preliminary Document No. 3 C, March 2014, available at: www.hcch.net/upload/wop/gap2015pd03c_en.pdf [last accessed 01 June 2015]; Achmad, 'Contextualising a 21st century challenge: Part One, Understanding international commercial surrogacy and the parties whose rights and interests are at stake in the public international law context' (2012) 7 *New Zealand Family Law Journal* 190-198.

result of ICS arrangements. Challenges to the child's right to preserve their identity, established under Article 8 of the United Nations Convention on the Rights of the Child (CRC),[2] are at the heart of these. Identity is a broad concept constituted of many different and often overlapping elements; for children in ICS, identity is complicated by the circumstances of their conception and birth. In some cases, children are born through ICS without an identity recognised under law, due to gaps in legal regulation and the application of conflicting domestic laws. Children are also being born through ICS who, despite having a legal identity, are unable to preserve specific elements of their identity. Consequently, such children are unlikely to be able to fully preserve their identity. It appears that in many ICS arrangements, limited thought is given by the multiple adults involved to the child's future identity and how to protect it. This occurs despite all children having an explicit right to preserve their identity under Article 8 of the CRC, leaving this group of children highly vulnerable regarding their ability to exercise this right.

Taking a public international law perspective and a child rights approach, this paper argues for the protection of the child's Article 8 right in the context of ICS. Whilst Article 7 of the CRC is also relevant to this discussion and is touched upon, it has been dealt with by the author comprehensively in a separate paper,[3] and therefore this paper takes Article 8 as its primary framework to examine issues relating to the child's identity in ICS. This is given the explicit focus of Article 8 on the child's right to preserve their identity and its broader framing of identity which is helpful in the ICS context. Section 2 hones in on three elements of identity that are particularly at risk in ICS situations. This analysis provides an entrée to the discussion presented in Section 3, highlighting why the child's right to preserve identity is of such importance in the ICS context.

Section 4 then provides a framework through which to view the child's right to preserve their identity under international law. The main focus here is analysis of Article 8 of the CRC. This forms the basis for an overview of the broader human rights law framework pertinent to the child's right under Article 8. Reference is included to relevant work of the Committee on the Rights of the Child and jurisprudence from regional human rights systems elaborating on the nature and content of the child's right to identity preservation. Emphasis is placed on the child's identity from a genetic and biological perspective, given the reality that these are elements of identity that children conceived and born through ICS are likely to face challenges in preserving.

2 United Nations Convention on the Rights of the Child 1989, 1577 UNTS 3.

3 Achmad, "Securing children's right to a nationality in a changing world: the context of international commercial surrogacy and twenty-first century reproductive technology", accepted for publication in Laura van Waas, Melanie Khanna and Mark Manly (eds.), *Solving Statelessness*, Wolf Legal Publishers, forthcoming 2016.

Section 5 places the legal framework in context, focusing on case examples demonstrating how children conceived and born through ICS have had their right to preserve identity placed at risk and in some instances, violated. Section 6 considers key lessons from donor-conception, adoption and domestic surrogacy relevant to the child's identity preservation right in ICS. These key lessons stress the potential implications of not upholding the child's Article 8 right in ICS. Drawing on these lessons as well as the international human rights legal framework and some of the challenges faced by children in exercising their Article 8 right in the ICS context to date, Section 7 clarifies what the child's right to preserve identity looks like when upheld in ICS situations, suggesting practical measures of implementation of Article 8 in this specific context. Section 8 concludes by making clear that as is the case for children as a group in general, the right to preserve identity is essential for all children who are conceived and born through ICS as an alternative method of family formation.

2 The elements of child identity at particular risk in International Commercial Surrogacy

The concept of identity is potentially broad and by nature, multifaceted. Indeed, one definition of 'identity' contained in the Oxford English Dictionary is 'Who or what a person or thing is; a distinct impression of a single person or thing presented to or perceived by others; a set of characteristics or a description that distinguishes a person or thing from others.'[4] Considering the situation of children conceived and born through ICS, it is first necessary to highlight which of their facets of identity are particularly at risk. This section introduces three specific elements of identity: the genetic and biological; personal narrative; and cultural elements. Although other elements of identity exist (for example, nationality) and fall under Article 8 (as discussed later in section 4(C)), these three elements are distinguished in this paper because of their particular relevance to child identity in ICS and the vulnerability of these elements within this context.[5] Highlighting these three elements of identity in this section begins to illustrate how the child's identity preservation right is at risk in ICS, allowing for these elements to then inform the discussion of the child's right to identity preservation in the ICS context in the remaining sections of this paper.

4 Oxford English Dictionary Online, 'Identity, n.' March 2015, available at: www.oed.com/view/Entry/91004?redirectedFrom=identity [last accessed 01 June 2015].

5 Given the focus of this paper on the genetic and biological, personal narrative and cultural elements of the child's identity in ICS situations, this paper does not discuss the child's right to a nationality. This topic is being addressed separately in a chapter by the author in the forthcoming book, *Solving Statelessness*, van Waas, Manly and Khanna (eds) (Cambridge).

2.1 Genetic and biological

From the point at which a child is conceived through ICS and continuing after their birth, his or her identity rights are potentially at heightened risk of breach. The likely complexity of the child's genetic makeup and biological antecedents is the root of the precariousness of the child's identity preservation right. This is because it is not unusual to have a factual scenario such as the following example (where different states could be substituted): a child is conceived and born through ICS resulting from an ICS arrangement initiated by commissioning parents (either same-sex or heterosexual) from New Zealand using donor sperm originating from a sperm donor in Denmark, donor eggs originating from an egg donor in the United States, and a surrogate mother in India. Consequently, establishing parentage in both fact and at law in ICS situations is often the first challenge to the child's identity preservation right, given their birth to a surrogate and the reality that they are unlikely the full genetic child of the person(s) intending to socially parent the child (due to the use of donor gametes). Furthermore, in some cases the child will have no genetic relationship to their commissioning parents, and when donor eggs or embryo are used, no genetic relationship to their surrogate mother (indeed, many ICS children are conceived using the sperm of the commissioning father, along with donor eggs).[6] When ICS arrangements involve anonymous donor conception (meaning the full identity of one or two gamete donors or embryo donors are unknown), the child's preservation of identity becomes impossible from a genetic perspective. Therefore, depending on the exact circumstances of an individual ICS arrangement, the impact of the complexity of the child's genetic parentage on their ability to exercise their Article 8 right varies.

Moreover, even in instances when identity information is available about the child's genetic parentage *vis-à-vis* donors, the preservation of this information and the child's access to it largely depends on commissioning parents disclosing the child's conception and birth circumstances to them and this identity information being safeguarded for the child's future reference. The extent to which such information is preserved will also impact the child's identity preservation right; for example, whether health history information about genetic parent(s) is preserved. Not preserving information about this sub-element of a child's genetic identity may have long-term negative impacts for the child, such as not being aware of genetic markers placing them at higher risk of a hereditary disease or medical condition.

6 Whilst no data exists on how many children have been conceived and born through ICS as a result of the sperm of the commissioning father being combined with donor eggs to form an embryo and transplanted into the surrogate mother, a survey of reported judgments in ICS matters in the Australian, New Zealand and England and Wales jurisdictions indicates that this happens in a high proportion of ICS situations.

Additional to risks raised through donor genetic parentage, children conceived and born through ICS may face challenges in preserving the biological element of their identity relating to their birth mother. She is the person who is the child's biological carrier and who sustains their development from foetus to child. This includes the transfer of bodily fluids such as blood and other nutrients; research has demonstrated that the period in utero has a direct impact on the child's health outcomes.[7] Yet this woman is not intended to assume the role of mother to the child in a social sense; often she is not intended to have any ongoing involvement with the child. If commissioning parents do have knowledge as to the identity of and identifying information about the child's surrogate mother, they may still chose not to disclose this to the child. Even if a child knows about their ICS arrangement and the identity of their birth mother, it will be difficult to access or obtain further information about her if it has not been preserved. Not preserving this biological element of the child's identity (despite the likely importance of a birth narrative and understanding of who gave birth to them) means that later in life, children may search for information relating to their birth mothers to try to preserve this element of their identity. Such efforts may encounter further practical difficulties due to the birth taking place in a different country (and perhaps a different culture) than the one they are growing up or have grown up in; tracing their surrogate mother is unlikely to be straightforward, and more so if her current contact information is not maintained in the years following the child's birth. At the extreme, when surrogates act completely anonymously,[8] it will be impossible for children to know who their birth mother was.

Ironically, the child's right to preserve their identity in ICS may be further challenged by decisions and actions taken to establish the child's legal parentage following their birth. This can happen when the child's legal parentage is established (for example, through domestic law mechanisms such as adoption orders and parentage orders), but no concurrent action is taken to protect information about their genetic and biological parentage and to therefore preserve the genetic and biological elements of their identity relating to donors and/or their surrogate mother. Establishing the child's legal parentage provides them legal certainty and status. But depending on the child's genetic makeup and given their birth to a surrogate mother, it does not provide the full picture regarding their parentage and family relations. Unless information about these elements of their identity is preserved, children in ICS may have a false or only

7 E.g. Gluckman et al., 'Effect of In Utero and Early-Life Conditions on Adult Health and Disease' (2008) 359 *The New England Journal of Medicine*, 61-73; Pembrey et al, 'Human transgenerational responses to early-life experience: potential impact on development, health and biomedical research' (2014) 51 *Journal of Medical Genetics*, 563-572.

8 In some ICS situations, surrogates are kept completely separate from the commissioning parents and the ICS arrangement is premised on this anonymity, i.e. they never meet each other and commissioning parents only get provided with limited information about the surrogate, such as age, ethnic background and number of previous children.

partial understanding of the elements of their identity relating to their genetic and biological parentage and family relations.

2.2 Personal narrative

Connected to whether children have the option of knowing about their birth mother and genetic parents and accessing information about their genetic and biological elements insofar as it enables them to preserve their own identity, the child's opportunity to form their own personal narrative may also be at risk in ICS situations. Identity is often shaped by the question 'Who am I?'. A central aspect involved in answering this and preserving one's identity is being able to know about one's own birth; information such as where, when, how and who was present. Therefore, personal narrative as an element of identity is broader than the genetic and biological element discussed previously. Genetic and biological aspects can form part of the child's personal narrative, but personal narrative as a distinct element of identity draws in many other aspects connected to a child's identity, such as their circumstances of birth and key care decisions made concerning them in their infancy. These are aspects contributing to a child's personal narrative that the child themselves has no agency to know independently. Whilst personal narrative is an element of identity which is added to over the course of an individual's lifetime, aspects which are accumulated early in life through events or actions from that time can be said to form a crucial basis for one's personal narrative, given their formative impact.

For example, if a surrogate in an ICS arrangement does not share personal information (for example such as name, age, ethnicity, language, contact details) about herself with the child's commissioning parents or allow this to be collected and stored for the child's future access, it is likely that any questions the child has in future regarding their birth circumstances will be left unanswered or not be fully representative of the reality. This is a real risk in ICS given the high incidence of ICS arrangements conducted through third parties such as surrogacy brokers or agencies, meaning commissioning parents may have inaccurate or no knowledge of the identity of the surrogate mother. This gap in a child's personal narrative will therefore have the effect of preventing some children born through ICS from preserving this aspect of their identity.

2.3 Cultural

Because ICS leads to children being born to surrogate mothers in supply states that they are not intended to remain in, the cultural element (including cultural heritage, ethnicity, language) of a child's identity relating to their birth-place

may also be at risk. If children born through ICS are unable to have information preserved about these parts of their own personal history, it may prevent them from being able to fully exercise and realise their Article 8 identity preservation right. When children born through ICS learn later in life that they were intentionally born through ICS in a state with a different culture and language from the one that they are growing up in or have grown up in, they may experience a sense of cultural dislocation or questioning, similar to that which has been experienced by some children adopted intercountry. However, children born through ICS may also contend with the overlay of the fact they were intentionally born into the culture and heritage of one country, but always intended to be removed from the immediate culture and heritage of their birth-place. The culture and heritage disconnection may have greater bearing on the child's ability to preserve their identity consistent with Article 8 for children who remain in their birth country whilst waiting for their status to be recognised or regularised. During such a period – which can span beyond weeks into months and even years – children may become accustomed and grow attached to certain cultural aspects of their birth place. For example, this may include the local language, if they are exposed to it regularly during infancy.

The ethnicity aspect of the child's cultural identity element is also at risk of not being preserved in ICS. This happens if the ethnicity of one or both of their genetic parents is different to the ethnicity the child will grow up in, and biologically, regarding their surrogate mother. The preservation of this element of the child's identity is dependent on information being protected about the child's genetic and biological ethnicity and the child having the opportunity to access this information. The child may experience a sense of ethnic dislocation and questioning regarding their genetic and/or biological ethnicity; regarding their genetic ethnicity, the child may also experience a sense of dislocation regarding their culture and heritage relating to this and may search to preserve it.

The three elements of the child's identity discussed above as being central to how the child's Article 8 right is at risk in ICS situations are interrelated. These elements will be elaborated on throughout the forthcoming analysis in this paper. It is important to recognise that identity and what this constitutes for an individual evolves over time; the formation of identity takes place to some extent over the timespan of an individual's lifetime. Whilst some elements of identity remain static, such as those more closely linked to the origins of an individual, there will be others which are socially acquired through an individual's life and lived experiences. However, the static elements of identity and the elements of identity acquired over time may not be any harder to preserve than one another. For example, whilst a child conceived and born through ICS may face challenges in preserving their genetic and/or biological identity, they may also find themselves unable to preserve elements of their family life, such as who they were raised by for certain periods of time in their early life, depending on the circumstances they are in. Furthermore, from a

chronological perspective, timing itself can impact the child's ability to exercise their Article 8 right. Many elements of identity, including the genetic and biological and personal narrative elements can be preserved or begin to be preserved in relation to a child prior to their birth. Following birth, the preservation of these elements should continue, given they cut across the pre-birth and post-birth time periods. Some other elements of identity are attached to birth and should therefore start being preserved at that time, such as the circumstances of the child's birth, and the cultural elements of their identity.

3 The Child's Perspective: Why the Right to Identity Preservation is Important in International Commercial Surrogacy

Whilst all children, regardless of their situation have a right to identity preservation under Article 8 of the CRC, some children face situations making their ability to secure this right more challenging, heightening their vulnerability regarding a breach of their Article 8 right. Children born through ICS fall into this category; it is therefore necessary to examine the reasons why the right to identity preservation is of such importance for this group of children.

3.1 Potential impact of conception and birth circumstances through International Commercial Surrogacy on children

The potential impact of the child's conception and birth circumstances through ICS on their subsequent ability to preserve their identity is significant. A child born through ICS is likely to have conception and birth circumstances which are complex due to the involvement of multiple parties (some of whom may be anonymous), the nature of their conception and birth through surrogacy, and added to this, being born in one state but with the intention that they will be taken to live in another state during infancy. Therefore, the particular complexities of a child's conception and birth through ICS challenge the preservation of certain aspects of their identity.

In the first instance, this is due to the multiple possible parentage claims relating to the child, involving genetic, biological and commissioning (intending) parents. The situation is complicated further by conflicting domestic laws and laws which are out-dated and are ill-equipped to deal with multiple possible parentage claims in ICS. In situations where genetic parents (gamete or embryo donors) and/or biological parents (surrogates) act anonymously, or in instances where commissioning parents abandon a child in ICS pre or post-birth, the child may be left with a highly unclear picture of the parentage aspect of their identity. This may have ongoing, life-long implications for the child. As Van Hoof and Pennings note, in this context the identifiability of

parents essentially means contactability;[9] without the ability to identify and contact their genetic, biological or commissioning parents, an element of the child's identity remains unable to be preserved. This may have an impact on the child's ability throughout their life to establish their own personal narrative and understand their own story of who they are. Indeed, stripping away a child's possibility of self-determinism in this regard concerning their identity positions the child in a potentially negative space, inconsistent with the best interests of the child principle.[10] Eekelaar asserts that 'Self determinism is a mode of optimally positioning children to develop their own perceptions of their well-being as they enter adulthood: not of foreclosing on the potential for such development.'[11] When children born through ICS ask the question 'Who am I?', the circumstances of their conception and birth through ICS will likely impose some limitations on their ability to gain full answers, thereby preventing them from being optimally positioned for self-determinism regarding their identity, as their ability to preserve their identity consistent with Article 8 of the CRC will be restricted.

At the more practical level, this may impact the child's health rights, by limiting their knowledge of their personal health and medical history connected to their parents. In instances where a child is born through ICS and the genetic and biological aspects of their identity are not preserved through the collection and protection of associated information, their ability to establish whether they are, for example, predisposed to genetic diseases or at risk of specific medical conditions detectable through genetic and biological parentage will be curtailed. As Cowden notes,

> 'People have an interest in accessing genetic and medical information about their genetic parents. It is in a child's interests to have knowledge of congenital diseases or traits that run in her (genetic) family. This is important for diagnosing and treating disease, and also for making fully informed family-planning decisions. False assumptions regarding one's medical history can lead to an individual being misdiagnosed, unknowingly forgoing important care or undergoing unnecessary treatment. This concern seems to constitute an interest worthy of protection.'[12]

Moreover, anonymity in ICS removes the child's opportunity to preserve the wider family relations element of their right to preservation of identity under Article 8. Children who are in this situation will be unable to know if they

7 Van Hoof and Pennings, 'Cross-Border Reproductive Care Around the World: Recent Controversies', in Botterill, Pennings and Mainil (eds), *Medical Tourism and Transnational Health Care*, (2013) 98, at 106.

10 As established in Article 3 UN Convention on the Rights of the Child supra n 2.

11 Eekelaar, 'Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determination' (1994) 8 *International Journal of Law, Policy and the Family* 42 at 58.

12 Cowden, 'No Harm, No Foul: A Child's Right to Know Their Genetic Parents' (2012) 26(1) *International Journal of Law, Policy and the Family* 102 at 107.

have genetic half-siblings. Such siblings may well exist, also born through donor-conception ICS or non-surrogacy donor-conception ART, or as the natural children of donors involved in ICS. In instances where ICS children are abandoned by commissioning parents, it is unlikely that they will ever have knowledge of their intended siblings, if they already exist as previous children of commissioning parents.

3.2 The implications for the child of being removed from their state of birth

It is a common feature of all ICS arrangements that the child will be born in a state which they are never intended to live in – from before the child's birth, it will be the intention of the commissioning parents that the child (once born) will travel with them to live in another state. This aspect of the child's birth circumstances is, therefore, complicated and has the potential to impact negatively on the child's ability to enjoy their Article 8 right. Given that in many cases, the supply of ICS flows from supply states in the less-developed world to more developed demand states, it is likely therefore that many children born through ICS will be born in a place and culture very different from that which they are intended to spend their childhood in. Even in ICS arrangements where the flow is between supply and demand states both located in the developed world, the fact remains that the child is intended to be born in one state and moved to another following birth. Whilst the cultural disjunction between the two states may not be as marked, differences will still exist. This cultural disconnect that is imposed on the child can have serious implications for the child's right to preserve their identity.

This is especially so given that not only is the supply state the child's place of birth and therefore of significance regarding their personal origins, but also the fact that the child is born to a surrogate who likely originates from and resides in that state. The links that the child has to their state of birth are important from a cultural rights and personal narrative perspective, regardless of whether the child has a link to the state through their genetic parentage.[13] Therefore, it is the child's likely double link to their state of birth through both the fact of their birth in that state, and their birth to a surrogate mother originating from that state that distinguishes children conceived and born through ICS from children who are not born through ICS, but who are born in a different state to that of their own natural parents.

Due to this reality, all children born through ICS may experience some level of identity dislocation or questioning if they learn (later in life) about their

13 However, in ICS situations where a child has a genetic link to a third (and potentially fourth) state which is not their state of birth (e.g. the state of a third-party egg or sperm donor), arguably that child has cultural elements of their identity relating to that state which should be preserved.

circumstances of birth to a foreign surrogate in a state distant from that which they are living and growing up in. The state in which the child has grown up in or is residing in will have become a part of their identity, yet learning they originated in a different state will introduce a new dimension of identity for the child and may cause them to question the extent to which the elements of their identity connected to their birth-state has been preserved. This experience may traverse the culture, language and ethnicity elements of the child's identity and may leave a child feeling uncertain of their identity. It is therefore extremely important to ensure that information about these aspects of the child's identity is preserved and made available for the child, to give them the option of knowing and help them in understanding and establishing these aspects of their identity.

Of course, this will not necessarily be a universal experience for children born through ICS. Some children may never question this aspect of their identity. Some children will never become aware of the circumstances of their conception and birth through ICS (because they are not told), whilst some may decide that this is not an element of their identity that they want to preserve through learning about their circumstances of birth and information regarding the cultural elements of their identity (given they are not interested, or do not feel this is necessary for their own identity preservation).

For children who end up spending an extended period of time in their birth-state after birth through ICS – that is, a number of months or years because they are stateless or for other reasons – the impact of being removed from their birth-state to another state part-way through their early childhood may have more significant implications. This is because during the first few formative months or years of the child's infancy, they will have grown accustomed to the culture, language and ethnic specificities of the state of their birth. They may therefore experience a greater cultural disconnect later in life which could impact on their identity. Whether the child is able and supported to preserve these elements of their identity once they are removed to the home state of their commissioning parents will be influential in this regard. This holds true for children who are not conceived and born through ICS, but who are born in one state and then move to another, or who move from state to state during their childhood. However, the situation of children born through ICS can be distinguished from these other situations based on two factors always present in ICS situations. The first is that in ICS, there is always an intentional decision made by commissioning parents to have a child born in a specific state. Secondly (as outlined above), there is always an intentional decision made to have a child born to a surrogate mother in that state. Taken together, these factors establish a link between the child and their birth-state, which is also likely to be the state of their surrogate mother.

4 The child's right to preserve their identity: Article 8 of the United Nations Convention on the Rights of the Child and beyond

The child's right to preserve their identity is explicitly established under international human rights law. Article 8 of the UN Convention on the Rights of the Child (CRC) is the crucial starting point in framing discussion of the child's identity in the ICS context.[14] As Doek observes, 'Article 8 of the CRC is a unique international human rights provision. There is no other international (or regional) human rights treaty that contains a provision similar to Article 8.'[15] Article 8(1) sets out the core of the right: 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.'[16]

In situations when children are illegally deprived of identity, States Parties have additional obligations, set out in Article 8(2): 'Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.'[17]

Article 8 was drafted and adopted in a very different time to our current-day context. Now, having a child through methods involving scientific intervention and in reliance on globalisation is a reality. The drafters of the CRC, whilst aware of some of the possibilities of assisted reproductive technology (ART), were only just beginning to imagine the potential implications of conception and birth via such methods for child rights.[18] In drafting Article 8 (as well as the rest of the CRC), the drafters did not envisage a world where ICS – let alone the various permutations of ICS arrangements[19] – would be something engaging the rights of the child and be dealt with under the Convention itself. Having acknowledged this, it is important to further consider the context in which Article 8 of the CRC was drafted and adopted, before turning to the content and interpretation of the child's Article 8 right in the ICS context.

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14 Article 8 United Nations Convention on the Rights of the Child supra n 2.

15 Doek, *A Commentary on the United Nations Convention on the Rights of the Child, Articles 8-9: The Right to Preservation of Identity and The Right Not to Be Separated From His or Her Parents* (2006) at 5. Detrick further characterises Article 8 as 'an innovative international human rights provision'. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999) at 162.

16 Article 8(1) United Nations Convention on the Rights of the Child supra n 2.

17 Article 8(2) United Nations Convention on the Rights of the Child supra n 2.

18 As Hodgson notes, this was a time of experimentation in in vitro fertilisation techniques and genetic engineering in many States. Hodgson, 'The International Legal Protection to of the Child's Right to a Legal Identity and the Problem of Statelessness' (1993) 7 *International Journal of Law, Policy and the Family* 255 at 265.

19 Achmad, supra n 1 at 191.

4.1 The development of the child's right to preserve identity

Article 8 was one of several new rights that the CRC established under international human rights law.[20] Cerda asserts that the text of Article 8 (as finally adopted) 'represents a negotiated compromise.'[21] Cerda explains the tensions inherent in the negotiations of Article 8 saying that 'On the one hand, some countries attempted to include a new legal norm inspired by certain regrettable experiences. Other countries, however, while not denying this phenomenon, were chiefly concerned that the text should be acceptable in their national legislatures.'[22]

The *travaux préparatoires* of the CRC provide a helpful supplementary means of interpretation when considering the development and content of Article 8.[23] The *travaux* assist, among other things, in understanding why the child's right to preserve their identity is included in the CRC as a specific right, separate to the child's Article 7 rights to nationality, birth registration and to know and be cared for by their parents. Article 7(1) of the final text of the CRC states that 'The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.'[24] It is evident from the final wording of the text of Articles 7 and 8 that although Article 8 deals explicitly with the child's right to preserve their identity, there is an intersection and to some extent overlap between the child's Article 7 and Article 8 rights, clear upon an ordinary meaning reading of the text of both articles. The aspects of the child's rights stated in Article 7(1) are certainly elements (or able to be construed as elements) of the child's identity, a concept which the child has a right to preserve under Article 8; indeed, some of these elements are explicitly mentioned again in Article 8(1). However, what is made clear by the distinction between the two Articles is that the aspects of the

20 For discussion of some of the other 'new' rights introduced by the CRC, see Cerda, 'The Draft Convention on the Rights of the Child: New Rights' (1990) 12 *Human Rights Quarterly* 115-119.

21 Ibid. at 116.

22 Ibid. at 115.

23 Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the "Traxaux Préparatoires"* (1992). Article 31(1) of the Vienna Convention on the Law of Treaties 1155 UNTS 331 sets out the general rule of treaty interpretation, namely that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Articles 31(2)-(4) further set out the context for the purpose of the interpretation of treaties, and Article 32 specifies supplementary means of interpretation. Article 32 covers the use of the *travaux préparatoires*, specifying that 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

24 Article 7(1) United Nations Convention on the Rights of the Child supra n 2.

child's rights to which Article 7(1) focuses on protecting are important in their own right, independent of the child's right to preserve their identity under Article 8(1). Furthermore, the wording of Article 8 (as explored further below) regarding the child's right to preserve their identity is not a right which is tethered to a restricted concept of identity, but rather the Convention's drafters left open the possibility of a broadly characterised concept. Article 8 does, however, have a reinforcing and broadening effect in relation to Article 7. Article 8 reinforces the child's right to knowledge relating to their parents set down by Article 7(1), by establishing the child's right to identity and including in this the wider element of family relations, thereby having a broadening effect beyond a focus solely on parents.

The interrelationship between Articles 7 and 8 is important to note in the context of ICS, especially given the inherent limitations and challenges that a child may face when conceived and born through ICS in preserving, for example, the genetic and biological elements of their identity.[25] This may mean that they not only face challenges in exercising their Article 8 right to preserve their identity, but also their Article 7 right regarding its focus (in part) on the child's right to know and be cared for by their parents. For example, in the ICS context, as well as the child's commissioning parents, the child's genetic parents and birth mother may be understood as 'parents' on the basis of their genetic and biological links, yet they are not intended to have a legal child-parent relationship. Indeed, they may remain unknown. Tobin states that Article 7 "exists as recognition of the potential that the identity of a parent may be unknown for a variety of reasons and it is thus impossible for a child to know that parent or indeed parents. As a result, article 7 should be interpreted to create a presumption in favour of providing children with access to information about their biological parents before they turn 18 where this is logistically possible, that is, if the information is available."[26] However, as Buck notes, the term 'parents' in Article 7(1) is potentially contentious in nature and scope.[27] This may be particularly the case in ICS situations, given the multiple potential parents involved in the conception and birth of a child through ICS. Whereas Article 7(1) refers to the child's parents, Article 8(1) has an explicit focus on identity and instead of 'parents' includes the broader notion of 'family relations' as one of the explicitly stated elements of identity. Therefore whilst Article 7 is of relevance, this paper focuses on Article 8 as

25 Interestingly, Detrick noted in 1999 that '… the interpretation of this right, especially considering the qualifying phrase "as far as possible" may be subject to controversy, also given the developments in the application of biology and medicine.' Detrick, supra n 15 at 153.

26 Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission, August 2004) at 37, available at: www.lawreform.vic.gov.au/sites/default/files/Tobin%2Bpaper%2BFINAL.pdf [last accessed 01 June 2015].

27 Buck, *International Child Law*, 3rd edn (2014) at 154.

its primary framework for dealing with the child's identity in the ICS context. Situating the discussion within the Article 8 framework is a useful approach given it is not restricted to parents, which may be a contested notion in ICS arrangements.

Regarding the genesis of Article 8, the *travaux* shows the idea for the provision stemmed from the Argentinian delegation's proposal to the open-ended Working Group in 1985.[28] Argentina advocated for inclusion of a specific article securing the child's right to identity to cover what it described as 'the legal void which otherwise would exist in the convention on the rights of the child.'[29] However, a number of other countries viewed this proposal for a new right regarding identity as problematic;[30] through the revision process, the word 'family' was removed and further revisions made to avoid duplication with other draft Convention provisions. Article 8 as it appears in the Convention was adopted by the Working Group (at second reading) in 1989.[31]

The potential intersection of the child's rights with what were, at the time of the drafting of the CRC, new assisted reproductive technologies, proved a contentious issue during the negotiation of the text of Article 8. The tension largely arose between the primacy of adult interests regarding confidentiality and anonymity of parents on the one hand, and the interests of the child to know their origins (including genetic and biological elements) on the other. For example, Czechoslovakia said it would 'maintain confidentiality of the child's origin in cases involving artificial fertilisation and certain adoption procedures based on the principle of anonymity',[32] whilst Mexico advocated

28 Detrick (ed), supra n 23 at 292. The proposal was introduced as article 9 bis, with the following text: 'The child has the inalienable right to retain his true and genuine personal, legal and family identity. In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a view to re-establishing his true and genuine identity as soon as possible. In particular, this obligation of the State includes restoring the child to his blood relations to be brought up.' As per *Considerations 1986 Working Group* (1986) E/CN.4/1986/39 at para 33.

29 Detrick (ed), supra n 23 at 293. Argentinian advocacy on this issue had its roots in the historical experience of children who had been forcibly disappeared during the Argentinian military junta in the late seventies and early eighties. As per *Considerations 1986 Working Group* (1986) E/CN.4/1986/39 at para 38.

30 Norway, the Netherlands, Austria, United States, Canada, Australia and Mexico raised concerns in reaction to the Argentinian proposal. See Detrick (ed), supra n 23 at 291-296. Argentina's original proposal focused on the protection of the child's 'true and genuine personal, legal and family identity.' A number of other state delegations submitted the view that the concept of 'family identity' was unknown in their legal systems. Australia was one such state and proposed deleting the word 'family' from appearing before the word 'identity'. As per *Considerations 1986 Working Group* (1986) E/CN.4/1986/39 at para 48.

31 Detrick (ed), supra n 23 at 296. as per UN Doc E/CN.4/1989/29/Rev.1 at 6.

32 Detrick, supra n 15 at 154.

from the child's perspective: 'The representative of Mexico stated that the wording should be more explicit as to the commitments made by the States under paragraph 1 and that the biological elements of the identity should also be included.'[33] Ultimately, Article 8 does not explicitly refer to the genetic and biological elements of a child's identity, given the concern of some states regarding the implication of applying such a provision to ART situations in practice, in a climate which was still widely premised on anonymity in both donor-conception and adoption.

Despite this, it is significant that the CRC drafters touched on issues about (then) new reproductive technologies in relation to the child's right to preserve identity. Whilst Hodgson describes the fact that the CRC text does not address questions of paternity and filiation as a somewhat curious omission,[34] he points out that the very reasoning for including Article 8 in the CRC serves as a foundation for understanding the provision as being applicable to those aspects of the child's identity based on biological and genetic links between children and adults:

> 'That the original Argentinian proposal was concerned with the protection of the child's 'true and genuine personal, legal and family identity' supports the proposition that the provision is also concerned with the biological or blood relationship of natural parent and child. Some reference might usefully have been made to possible procedures for the acknowledgment or recognition of parenthood. […] Thus, a number of aspects of Article 8(1) remain open-ended, to be interpreted as a matter of discretion in light of national practices and needs.'[35]

As will be discussed further in section 4.3.1 below, the Committee on the Rights of the Child has, in some of its concluding observations, elaborated on how elements of a child's identity such as the genetic element should be approached under the CRC.

4.2 The concept of 'preserving' identity under Article 8(1) of the Convention on the Rights of the Child

It is important to underscore that the child's Article 8(1) right is not to identity per se, but to preserve identity. Hodgkin and Newell state that 'preserve'

> 'implies both the non-interference in identity and the maintenance of records relating to genealogy, birth registration and details relating to early infancy that the child could not be expected to remember. Some of these are beyond the scope

33 Detrick (ed), supra n 23 at 296 as per *Considerations 1986 Working Group* (1986) E/CN.4/1986/39 at para 336.
34 Hodgson, supra n 18 at 265.
35 Ibid.

> of the State, but measures should be taken to enforce detailed record-keeping and preservation of records (or, in the case of abandoned children, preservation of identifying items) where children are refugees, abandoned, fostered, adopted or taken into the care of the State. Equal care must be taken to ensure such records are confidential.'[36]

That Article 8 is a right to preserve identity is particularly relevant in the ICS context. While it is true that some children born through ICS will be precluded from establishing elements of their identity – such as nationality – it is the preservation of other elements of the child's identity which can be effected through the maintenance of detailed and accurate records from the time of birth through their early infancy. Despite this, currently such an approach is not the norm in ICS situations, as will be made clear later in this paper. As already mentioned, identity is a broad concept which can evolve and grow over the course of a human lifetime. Preserving identity is, therefore, an ongoing exercise, but for children conceived and born through ICS, it is the preservation of identity from conception and post-birth that is most acutely at risk, especially given these are elements of their identity that children cannot be expected to independently preserve themselves.

4.3 The content of the right to preserve identity under Article 8(1) of the CRC

The CRC text gives some shape and content to the concept of identity through explicitly listing some elements of identity – nationality, name and family relations – in Article 8(1). That these constitute elements of the child's right to preserve their identity is therefore not controversial. However, these elements are prefaced with the word 'including', indicating that Article 8(1) provides a non-exhaustive list of elements constituting identity, and that other elements are not excluded.[37] Hodgson notes that 'The insertion of the word 'including' between 'identity' and 'nationality' in Article 8(1) demonstrates that these enumerated attributes are merely illustrative; other attributes of identity might fall within the ambit of the provision. [..]Indeed, the insertion of the word 'including' into the text of Article 8(1) was recommended by the United Nations Secretariat 'so that other elements of identity will not be excluded.'[38] Both Cerda and Doek elaborate on this point. Cerda notes that concepts evolve and therefore Article 8 should extend to cover identity of

36 Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child* (United Nations Children's Fund, 2007) at 115.

37 Detrick, supra n 15 at 163.

38 Hodgson, supra n 18 at 265 as per *Technical Review of the Text of the draft Convention on the Rights of the Child: Additional Comments and Clarifications by the Secretariat* E/CN.4/1989/WG. 1/CRP. 1/Add 1(14 November 1988) at 7 para 22.

children born in new ways;[39] Doek asserts that 'the Convention is a living instrument and its interpretation should reflect new developments that may arise in the area of children's rights'[40] and furthermore 'The Convention must be interpreted in the light of the present-day conditions.'[41]

Approaching the CRC as a living instrument to be interpreted in light of new developments in the area of children's rights (such as children being born in new ways, including through ICS), means it is necessary to consider what further elements of identity can fall within Article 8. It is now widely accepted that when read together, Article 8 and the wider Convention text actually protect a much broader array of elements constituting the child's identity, such as sexual orientation and the right to their own culture (for example in the intercountry adoption context).[42] Hodgkin and Newell provide a comprehensive list of elements they see as fit for inclusion in what constitutes identity under the CRC, namely the child's personal history since birth (including information such as where the child lived, who they were in the care of, the reasons for crucial decisions relating to them); the race, culture, religion and language of the child (these aspects are also supported by Articles 20 and 30 of the CRC); and the physical appearance, abilities, gender identity and sexual orientation of the child.[43]

Here it is further useful to note the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption,[44] an international child law instrument including explicit provisions relating to the child's identity right. Articles 16 and 30 focus on ensuring preservation of the child's identity under the Hague adoption process. Article 16 specifies that the Central Authority of the child's state of origin must, after being satisfied that a child is adoptable, prepare a report including 'information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child.'[45] The Central Authority must also 'give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background'.[46] Article 30 establishes the obligation on all contracting states to the Convention to 'ensure that information held by them concerning the child's origin, in particular concerning the identity of his or her parents, as well as

39 Cerda, supra n 20 at 116-117.
40 Doek, supra n 15 at 3.
41 Ibid. at 10.
42 CRIN, 'Article 8: Preservation of Identity' available at www.crin.org/en/home/rights/convention/articles/article-8-preservation-identity [last accessed 01 June 2015].
43 Hodgkin and Newell, supra n 36 at 115.
44 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993.
45 Article 16(1)(a), supra n 44.
46 Article 16(1)(b), supra n 44.

the medical history, is preserved.'[47] Contracting states are required to ensure that the child (or their representative) 'has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.'[48]

By placing emphasis on the child's identity and specific at-risk elements of identity, the Hague Convention highlights aspects of the child's identity requiring preservation in intercountry adoption. Taken together, these provisions of the Hague Convention set out a clear framework for preserving the child's identity in intercountry adoption situations, giving flesh to the bones of Article 8 and other identity-related provisions of the CRC. These identity-related provisions of the Hague Convention interact with the CRC, giving further shape to the content of the child's right to identity under Article 8 in practice along with Articles 7, 20 and 30 of the CRC.[49]

The above discussion indicates that the child's Article 8(1) right to preservation of identity is certainly broader than the elements mentioned explicitly in the text of Article 8(1). Interpreting Article 8(1) of the CRC in this way applies a dynamic interpretative approach, in light of contemporary developments. The additional elements of identity highlighted throughout this section are potentially of relevance for a child conceived and born through ICS. However, personal history since birth, culture, ethnicity and language elements of identity are of increased importance for children born through ICS. This is because they may well be elements of their identity which they face difficulties in preserving, given the fact of their conception and birth through ICS. But what of the biological and genetic elements of the child's identity? These are further elements of identity which are acutely at risk of not being preserved in the case of children born through ICS, but are elements not explicitly mentioned in Article 8. Given this, it is important to more closely consider whether these can be said to constitute elements of identity of the child under Article 8(1) of the CRC.

4.3.1 The child's identity from a biological and genetic perspective

In considering whether the biological and genetic elements of a child's identity fall within the coverage of the right provided by Article 8(1) of the CRC, guidance can be drawn from a number of sources. The first is the United Nations Committee on the Rights of the Child (the Committee). Although there is no definitive, comprehensive interpretative guidance on Article 8 as the Committee has not issued a General Comment on Article 8, the Committee has made some

47 Article 30(1), supra n 44.

48 Article 30(2), supra n 44.

49 Article 20(3) United Nations Convention on the Rights of the Child supra n 2 states that care solutions for a child temporarily or permanently deprived of his or her family environment should pay due regard to 'the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'; Article 30 makes clear that children have a right to enjoy their own culture and to use their own language.

relevant references and observations regarding the concept of identity in the course of its work. A starting point is that the Committee has a long history of emphasising the importance of protection of information regarding a child's biological family, and the child's ability to access that information.[50] In some instances such as adoption, the Committee has directly stated the importance of the child's right to identity and articulated the 'right of the child to know his or her biological parents'.[51] The Committee takes the position that under the CRC, the concept of knowledge of origins goes beyond a child knowing their legal parent(s), placing an emphasis on biology.[52] Additionally, the Committee has extended the child's right to know their biological origins beyond parents to wider family relations. In its Concluding Observations regarding the Holy See in 2014, the Committee noted that the State party must take 'into full account the right of children to know their biological parents and siblings'.[53]

Addressing the situation of children in the context of assisted reproductive technology (ART), the Committee has, since the mid-1990s, issued concluding observations containing statements regarding the child's right to identity preservation when conceived and born ART. Considering the early Danish approach to ART which was based on donor anonymity, the Committee responded that 'Concerning the right of a child to know his or her origins, the Committee notes a possible contradiction between this provision of the Convention and the policy of the State party with respect to artificial insemination.'[54] The Committee made similar remarks regarding Norway's then policy of keeping sperm donor identity secret, again referring to the child's 'right to know his or her origins'.[55] Moreover, the Committee in its 2002 Concluding Observations on the United Kingdom of Great Britain and Northern Ireland expressed concern that 'children born in the context of a medically assisted fertilization do not have the right to know the identity of their biological

50 E.g. Committee on the Rights of the Child, *General Guidelines for periodic reports* (1996) UN Doc. CRC/C/58) at para 24: 'having access to information concerning its biological family' is listed by the Committee as something the Committee wants to know about in periodic reporting under the Convention in relation to the minimum legal age defined by national legislation.

51 Ibid. at para 83.

52 Clark, 'A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins' (2012) 40(3) *Georgia Journal of International and Comparative Law,* 619 at 627.

53 Committee on the Rights of the Child, Concluding observations regarding the Holy See, 25 February 2014, CRC/C/VAT/CO/2, at para 36, addressing the situation of anonymous abandonment of babies in baby-boxes.

54 Committee on the Rights of the Child, Concluding observations regarding Denmark, 15 February 1995, CRC/C/15/Add.33, at para 11.

55 Committee on the Rights of the Child, Concluding observations regarding Norway, 25 April 1994, CRC/C/15/Add.23, at para 10.

parents.'[56] Significantly, it recommended that 'the State Party take all necessary measures to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible.'[57]

Considering the Committee's approach to the child's right to preserve identity from a biological and genetic perspective, Clarke's assessment that 'The United Nations Committee on the Rights of the Child appears to interpret the CRC as bestowing a clear right to donor-conceived children to knowledge of their genetic identity'[58] is valid. Doek further asserts that 'in the light of the present day developments and a dynamic interpretation of the CRC, it can be considered to include in the right to preserve your identity, the right to be informed about your (biological) origins. At the same time, it is a matter of respect for the rights of donors to protect them from any legal or financial responsibility for the child conceived with their assistance.'[59] It is this requirement for a balancing of rights and interests that is likely, therefore, to be the reason why the Committee has sometimes couched its position in the terms of 'to the extent possible'.

Despite not having addressed the issue of child identity preservation in ICS, for the first time the Committee recently commented on the child's right to identity in the context of domestic surrogacy. In Concluding Observations regarding Israel, the Committee expressed concern regarding the child's identity rights when born through surrogacy in Israel.[60] It recommended that '… in the regulation of assisted reproduction technologies, particularly with the involvement of surrogate mothers, the State party ensure respect for the rights of children to have their best interests taken as a primary consideration and to have access to information about their origins.'[61] The Committee did not elaborate as to the exact content of such information. However, based on its previous observations regarding the importance of biological origins, at a minimum it is reasonable to say that the Committee is expressing an expectation that children born through surrogacy will be ensured access to information about their biological origins – therefore information about their genetic parents and biological siblings. Interestingly, the Committee did not couch this expectation in terms of 'to the extent possible'. This may signal a development in the Committee's position on the provision of origin information to children conceived and born through alternative methods of family formation; arguably

56 Committee on the Rights of the Child, Concluding observations regarding the United Kingdom of Great Britain and Northern Ireland, 09 October 2002, CRC/C/15/Add.188, at para 31.
57 Ibid. at para 32.
58 Clark, supra n 52 at 628.
59 Doek, supra n 15 at 12.
60 Committee on the Rights of the Child, Concluding observations regarding Israel, 04 July 2013, CRC/C/ISR/CO/2-4, at para 33.
61 Ibid. at para 34.

the Committee is saying that in surrogacy situations, the child should have access to information about their origins. Furthermore, the open-ended nature of the wording chosen by the Committee allows an argument to be made that for children born through surrogacy, access to information about their origins should extend to identity information from a wider personal history perspective. For example, preserving and allowing the child to access information about the circumstances of their conception and birth through surrogacy, including who was involved (such as the surrogate, the commissioning parents, donor/genetic parents and medical professionals), where and why could form an important part of the child's personal narrative in later life, helping give shape to the child's right to preserve their identity under Article 8(1).

The above work of the Committee demonstrates that it is clearly of the view that the biological and genetic elements of identity fall within the child's Article 8 right. Tobin posits that 'on balance, international law supports a presumption in favour of allowing a child to receive information identifying his or her biological parents. This right is not absolute and must be balanced against a biological parent's right to privacy. It also remains subject to the overriding caveat that the release of identifying information must not be contrary to the child's best interests.'[62] Given that the balancing of rights between the child and other parties involved in ICS is complex and such a significant issue from a rights perspective, it will be considered by the author in a separate paper. However, it is indeed true that the Committee makes clear that it is usually in the best interests of the child to protect and preserve the biological and genetic elements of all children's identities, including where the child is conceived and born outside of a natural conception and birth situation. Whilst the Committee has not yet directly commented on the child's right to preserve their identity in the context of ICS either in relation to Article 8 or 7, its comments in related contexts analysed above form a very strong indication that the Committee would likely take the position that in ICS situations, the child's right to preserve identity under Article 8(1) covers the biological and genetic elements of their identity (thereby reinforcing the child's Article 7 right to know and be cared for by their parents). Albeit made in the context of domestic surrogacy, the recent comment from the Committee on domestic surrogacy in the Israeli context is indicative of the importance the Committee places on the child's right to preserve their identity in surrogacy situations. It provides insight into the Committee's possible future approach to the child's preservation of identity in ICS situations.

62 Tobin, supra n 26 at 35.

4.4 The right to identity in regional human rights jurisprudence

Additional to the guidance from the Committee on the Rights of the Child, in order to further understand what constitutes a child's identity, reference to selected jurisprudence from regional human rights systems is elucidating. In the jurisprudence referred to below from the Inter-American Court of Human Rights and the European Court of Human Rights, the content of 'identity' has been confirmed and elaborated upon. This jurisprudence is of significant relevance to the focus of this paper on the child's right to preserve identity in the context of ICS, given that it confirms that identity is constituted of multiple elements and that it is an essential aspect of an individual's human rights with lifelong impact.

4.4.1 Inter-American Court of Human Rights

The American Convention on Human Rights[63] does not explicitly include the right to identity. Yet the Inter-American Court of Human Rights has addressed the right to identity in its jurisprudence, for example in *Serrano-Cruz Sisters v. El Salvador*,[64] a landmark case concerning children who were the victims of enforced disappearance by the Salvadoran army. Dissenting in *Serrano-Cruz*, Judge Cançado Trindade asserts the essential nature of identity to humans:

> 'Without a specific identity, one is not a person. The individual is constituted as a being that includes his supreme purpose within himself, and realizes this throughout his life, under his own responsibility. In this optic, safeguarding his right to an identity becomes essential.'[65]

Judge Ventura Robles (also dissenting in *Serrano-Cruz*) further emphasises that as well as being essential in nature, the right to identity allows individuals to access personal and family information that can enable the construction of personal history and biography.[66] Judge Robles highlights the interrelated and symbiotic relationships between different members of a family and the importance of identity of each member of such a group in relation to the

63 American Convention on Human Rights 1969, OAS Treaty Series No. 36.

64 *Case of Serrano-Cruz Sisters v. El Salvador* IACtHR Series C 120 (2005).

65 Ibid. dissenting opinion of Judge Cançado Trindade, at para 15.

66 Ibid. dissenting opinion of Judge Ventura Robles on the Third Operative Paragraph at para 138, stating: 'Given that the exercise of the right to identity allows the individual to have access to personal and family information that will enable him to construct his own personal history and biography, the Court considers that the right to identity is an essential element of the life of all individuals and not only of children; moreover, its exercise is essential for establishing relationships with the different members of the family, and between each individual and society and the State.'

others,[67] observing that the Inter-Amercian Court of Human Rights has recognised that everyone has a right to identity, and this is

> 'a complex right which, on the one hand has a dynamic aspect linked to the evolution of the personality of the individual, and includes a series of attributes and characteristics that allow each person to be individualized as unique. Personal identity starts from the moment of conception and its construction continues throughout the life of the individual, in a continuous process that encompasses a multiplicity of elements and aspects which exceed the strictly biological concept and correspond to the biographical and "personal reality" of the individual. These elements and attributes, which comprise personal identity, include such varied aspects as a person's origin or "biological reality," and his cultural, historical, religious, ideological, political, professional, family and social heritage, as well as more static aspects relating, for example, to physical traits, name and nationality.'[68]

Concerning the elements of identity, Judge Cançado Trindade also identified various elements, saying that 'The right to identity presumes the right to know personal and family information, and to have access to this, to satisfy an existential need and safeguard individual rights. This right also has an important cultural (in addition to social, family, psychological and spiritual) content, and is essential for relationships between each individual and the rest of society, and even for his understanding of the outside world, and his place in it.'[69] All of these are highly relevant to the child's situation in ICS, as traversed earlier in Sections 2 and 3; indeed, giving effect to Article 8 CRC in practice amounts to ensuring the child is able to have a full picture of all the strands of their identity 'reality', based upon the various elements of identity.

4.4.2 European Court of Human Rights

The jurisprudence of the European Court of Human Rights is also helpful in understanding what can be said to constitute the various elements of identity from a human and child rights perspective under international law. Like the ACHR, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not explicitly include a right to preserve identity. However, Article 8 of the ECHR protects the right to respect for private and family life and the ECtHR has held, in a number of leading decisions, that

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67 Ibid. dissenting opinion of Judge Ventura Robles on the Third Operative Paragraph at para 176, stating: 'Family relations and co-existence, and also the given name and surnames of a person, are essential for forming and preserving the identity of the individual. These elements of the right to identity are essential for both the children and the adult members of a family, given that the identity of each of the members affects and has an influence on that of the others, and also on their relationship with society and with the State.'

68 Ibid. dissenting opinion of Judge Ventura Robles on the Third Operative Paragraph at para 132.

69 Ibid. dissenting opinion of Judge Cançado Trindade at para 14.

the right to identity falls within the scope of the rights protected under Article 8 of the ECHR.[70] Viewing the right to identity as a matter of importance for all human beings in terms of their own personal development, the Grand Chamber of the European Court held in *Odievre v. France* that the Convention protects a vital interest 'in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents, birth, and in particular the circumstances in which a child is born, forms a part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention.'[71] The fact that the European Court specified as an element of identity 'the circumstances in which a child is born' is of particular relevance to children born through ICS. Of further significance in this context, the Court elaborated in *Odievre* that people 'have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development.'[72]

This emphasis on a person receiving a broad range of information as necessary to both know and understand these aspects of their identity is again significant. The Court's judgment in *Odievre* was applied by the Court in *Phinikaridou v. Cyprus*, which underscored both the importance of the circumstances of birth and access to information 'necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents.'[73] Applying its earlier judgments in *Mikulic v. Croatia*[74] and *Gaskin v. The United Kingdom*,[75] the Court said that an individual's entitlement to such information is of importance because of 'its formative implications for his or her personality'.[76] The Court, however, has made clear that the right to identity is, in its view, not absolute. As the Court held in *SH and Others v. Austria*, a balance must be struck between private and public interests involved; in that particular case it found that the Austrian legislator could 'find an appropriate and properly balanced solution between competing interests of donors requesting anonymity and any legitimate interest in obtain-

70 E.g. the Grand Chamber of the European Court of Human Rights in *Odievre v. France* Application No 42326/98, Merits and Just Satisfaction, 13 February 2003 at para 29 held that: "Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world."

71 *Odievre v. France,* Application No 42326/98, Merits and Just Satisfaction, 13 February 2003 at para 29.

72 Ibid. at para 42.

73 *Phinikaridou v. Cyprus,* Application No 23890/02, Merits and Just Satisfaction, 20 December 2007 at para 45.

74 *Mikulic v. Croatia,* Application No 53176/99, Merits and Just Satisfaction, 07 February 2002.

75 *Gaskin v. United Kingdom,* Application No 10454/83, Merits and Just Satisfaction, 07 July 1989.

76 *Phinikaridou v. Cyprus,* Application No 23890/02, Merits and Just Satisfaction, 20 December 2007 at para 45.

ing information of a child conceived through artificial procreation with donated ova or sperm.'[77]

In this connection however, it is worth mentioning a decision outside the European Court context but which is notable given that it may represent a shift among European countries towards adopting a more progressive stance regarding the child's right to preserve their identity. Indeed, if it does signal a shift, it is a shifting of the balance strongly towards the child knowing their biological and genetic origins in all situations, outweighing competing interests. This is the recent decision of the Bundesgerichtshof (Federal Court of Justice of Germany) which held that all children, regardless of their age, have a right to know their origins, including the identity of anonymous sperm donor fathers.[78] The Court said that this information may be important for the development of the child's personality.[79] With regard to the balancing of interests involved, the Bundesgerichtshof held that in the majority of cases, the child's rights to know their origins and to know their parents will be greater than that of the donor's right to privacy.[80]

Recently too, the European Court of Human Rights has begun to engage with the issue of the child's right to preservation of identity under the rubric of Article 8 of the ECHR in the specific context of ICS. The broader significance of these decisions have and will be dealt with elsewhere;[81] for the purposes of this paper it is important to touch on the Court's approach to date in dealing with identity rights for children born through ICS. The judgments in *Mennesson v. France*[82] and *Labassee v. France*[83] represent the first time the Court dealt with ICS matters. The Court in *Mennesson*, recalling its earlier jurisprudence relating to identity rights, held that respect for private life under the Convention requires that individuals can establish their personal identity, which includes their filiation.[84] Regarding the Mennesson twins, the Court found that France had erred in not recognising the biological link between the children and their commissioning fathers, and that the indeterminacy of this non-recognition (and resulting situation of non-recognition of French nationality, another important element of identity) would likely have a negative impact on the development of their identities.[85] It held that being deprived of a legal relationship with their proven biological fathers was incompatible with the

77 *SH and Others v. Austria*, Application No 57813/00, Merits and Justification, 03 November 2011 at para 84.
78 Judgment of the XII. Civil Division from 28 January 2015 – XII ZR 201/13.
79 Ibid. at 16 at para 41.
80 Ibid. at 21-23 at paras 54-59.
81 E.g. see Achmad, 'Children's rights to the fore in the European Court of Human Rights' first international commercial surrogacy judgments' (2014) 6 *European Human Rights Law Review* 638-646.
82 *Mennesson v. France*, Application No 65192/11, Merits and Just Satisfaction, 26 June 2014.
83 *Labassee v. France*, Application No 65941/11, Merits and Just Satisfaction, 26 June 2014.
84 *Mennesson v. France*, supra n 81 at para 96.
85 Ibid. at para 97-98.

children's best interests, and that France had exceeded its margin of appreciation.[86]

In its judgment in *Paradiso and Campanelli v. Italy*,[87] the Court has again dealt with the identity aspect of the child's right to private life in an ICS situation. In this case however, unlike the situations in *Mennesson* and *Labassee*, the Court was confronted with a child, Teodoro who was born through ICS but is not genetically related to either of his commissioning parents.[88] The Court in its judgment observes that as a result of this fact and the subsequent actions of the Italian government, Teodoro was effectively left without an identity for over two years.[89] In recognising this, it appears that the Court was referring to the child's legal identity. Of course, Teodoro's personal history developed during this time, contributing to his identity, although the extent to which these were preserved for him by the adults involved in his care is unclear. The Court said that at a practical level as well as a developmental level, his lack of (legal) identity caused Teodoro disadvantage,[90] inconsistent with his rights under the CRC. He had been issued with a new legal identity – in terms of his birth certificate and nationality – and placed in foster care. Since that time, the Court held that he had developed a bond with his foster family, and therefore Italy was not required to return him to his commissioning parents, who had no genetic relationship to him.[91] This was despite his commissioning parents intending that there would be a paternal genetic link with Teodoro when they embarked on their ICS arrangement. The facts of Teodoro's situation are illustrative of the myriad complex risks to children who are conceived and born through ICS. Moreover, that a new legal identity was essentially created for Teodoro raises the question to what extent this identity was in sync with his original identity, and raises the spectre of elements of his original identity – such as his own personal narrative regarding his conception and birth and the fact his conception was instigated by his commissioning parents – having been erased at law through the creation of his new legal identity. However, the facts of Teodoro's personal history and therefore particular elements of his identity have been preserved through documentation in the various court judgments pertaining to his situation. Despite this, there is currently no guarantee that all children who end up in similar situations through ICS will have such elements of their identity preserved.

Taken together, the European judgments canvased above provide a platform for recognising the importance of the child's right to preserve their identity, and that this right encapsulates the elements of genetic and biological

86 Ibid. at para 99-100.
87 *Paradiso and Campanelli v. Italy*, Application No 25358/12, Merits and Just Satisfaction, 27 January 2015.
88 Ibid. at paras 19, 22.
89 Ibid. at para 85.
90 Ibid.
91 Ibid. at para 88.

origins. The decisions largely indicate that from a rights balancing perspective, the right of the child to preserve their identity to the fullest extent possible is likely to outweigh the right of donors to privacy. This sends a strong message that from a best practice perspective, gamete donors involved in ICS should be identifiable to enable the child to preserve their identity. The Court's decision in *Paradiso and Campanelli* indicates that the Court views the concept of identity as evolving and adapting over time depending on the child's circumstances, but that some elements of identity remain static, such as genetic parentage. However, the Court in this case did not explicitly consider how the elements of a child's identity relating to the child's personal narrative about their origins should be preserved, such as the circumstances of their conception and birth as they relate to the intention of their commissioning parents.

5 How the child's Article 8 right has been breached in international commercial surrogacy situations

The cases examined below place the preceding discussion in context and are illustrative of the ways various elements of the child's identity can fail to be protected in ICS, preventing the child from preserving their identity, inconsistent with their best interests.[92] In some cases, based on the child's specific circumstances, a particular element of the child's identity is emphasised. However, in all the cases below, more than one of the child's elements of identity has failed to be preserved, impacting negatively on the child's ability to exercise their Article 8 right and to benefit from the protection it is intended to provide.

5.1 Volden twins

Twins Adrian and Mikael Volden were born in India in 2010 to an Indian gestational surrogate mother, commissioned by a single Norwegian woman.[93] The twin's genetic parents are allegedly an Indian egg donor and a Scandinavian sperm donor, both anonymous.[94] Conflicting Indian and Norwegian nationality and parentage laws left the twins stateless for their first 15 months, stranded in India; their Article 8 right has been breached in a number of ways because of the circumstances of their conception and birth through ICS. As

92 Article 3, Convention on the Rights of the Child supra n 2.

93 Roy, 'Stateless twins live in limbo' *Times of India* (2 February 2011) available at: www.timesofindia.indiatimes.com/city/mumbai/Stateless-twins-live-in-limbo/articleshow/7407929.cms [last accessed 01 June 2015].

94 Ibid. However, Melhuus states that the nationality of the gamete donors is unknown. See Melhuus, *Problems of Conception: Issues of Law, Biotechnology, Individuals and Kinship* (2012) at 84.

well as being stateless without a nationality for an extended period (one of the explicit elements of identity under Article 8), even since the twins gained Norwegian nationality, they remain unable to preserve their genetic identity, given their genetic parents donated gametes anonymously. This further means they are unable to preserve their genetic health history, culture and heritage. Regarding their culture and heritage related to their birth place and their birth mother, Adrian and Mikael remained in India, their birth country during their early infancy.[95] Although their commissioning mother cared for them in India during this time, they may have experienced the culture and language of their birth place and of their birth mother. They were then transferred to Norway, a state with a very different culture and language. Therefore, these identity elements associated with their birth place and birth mother may be challenging for them to preserve. Depending on how their commissioning mother approaches these issues later in their lives, these elements of their identity may be difficult for the twins to deal with as they seek to make sense of their identity and preserve it.

5.2 D and L (Surrogacy)[96]

This case in the Family Division of the United Kingdom High Court concerns twin boys, D and L, born to a surrogate mother in India and a male same-sex couple residing in the UK.[97] Genetically, D and L are the children of one of their commissioning parents and an anonymous Indian egg donor.[98] Given their genetic mother's anonymity, the twins are unable to preserve half of their genetic identity and related sub-elements such as medical history, ethnicity, culture and heritage. However, *D and L (Surrogacy)* is particularly notable as it highlights the practical limitations in preserving biological identity elements relating to children's birth mothers in ICS. Whilst the twin's commissioning parents had information they believed was identifying information about the surrogate, they could not locate her following the twins' birth. An agent seeking to locate her told the Court:

> 'I am sorry to inform you that I could not locate Miss B. The address provided by the clinic where Miss B should be residing… is not the place where she lives. […] Nobody there had any knowledge of Miss B or where she is living now. I have shown neighbours [identity] card of Miss B and they did not recognise her. I could not find out where she lives now.'[99]

95 Lysvold, 'Kari Ann Volden får komme hjem' *NRK* (15 April 2011) available at: www.nrk.no/nordland/kari-ann-volden-far-komme-hjem-1.7596488 [last accessed 01 June 2015].
96 *D and L (Surrogacy)* [2012] EWHC 2631 (Fam).
97 Ibid. at paras 2 and 8.
98 Ibid. at para 6.
99 Ibid. at para 14.

This illustrates the precariousness of preserving this element of the child's identity in ICS; the risks of surrogate mothers providing false or inaccurate identity information, failing to update contact information or simply acting anonymously and therefore placing this element of the child's identity beyond reach are real.

5.3 Paradiso and Campanelli v. Italy[100]

This case, already mentioned in section 4D(ii) above concerns a child, Teodoro, intended to be the genetic child of one of his commissioning parents, but who was born genetically unrelated to either. Teodoro's genetic parents remain unknown; his birth mother has no on-going involvement with him; the Italian state has removed Teodoro from his commissioning parents and he is now the legal child of persons who were in no way involved in the ICS arrangement. The case therefore raises questions regarding the family relations element of Teodoro's identity. Whilst the European Court of Human Rights found Teodoro's removal from his commissioning parents violated Article 8 of the European Convention,[101] it concluded he was attached to his new carers and should remain with them.[102] Yet this child has particularly complex family relations given the multiple parties involved in his ICS arrangement from genetic, biological and social perspectives. They each form an important part of the family relations element of his identity; they relate to particular periods in his life and have a bearing on his personal narrative and other elements of his identity, all of which may have an enduring impact on his life. They are elements of his identity which should be preserved consistent with Article 8.

Furthermore, the judgment highlights that although Teodoro received a new identity under law, he was without a legal identity for over two years.[103] However, the judgment does not point out that elements of his identity such as genetic identity (including medical history, ethnicity, culture and heritage), biological identity (relating to his surrogate mother, such as her culture, ethnicity and medical history) and cultural identity relating to his birth place have not been preserved, and that consequently he will be unable to preserve his identity consistent with Article 8 CRC. At best, these elements of Teodoro's identity have failed to have been preserved, and at worst, erased.

100 Supra n 87.
101 Supra n 87 at para 87.
102 Supra n 87 at para 88.
103 Supra n 87 at para 85.

5.4 In the Matter of an Application by DMW and KW to adopt a male child[104]

In this New Zealand case, a child, A, was born to a surrogate mother in Thailand and to New Zealand commissioning parents DMW and KW. A was intended as the genetic child of Mr DMW and Mrs KW's niece, Ms KP, through an embryo created from their gametes.[105] However, DNA testing revealed A is genetically unrelated to Mr DMW and Ms KP (likely due to clinical error); his genetic parents remain unknown (testing also excluded A's surrogate mother as his genetic mother).[106]

Mr DMW and Mrs KW indicated to the Court they committed to parenting A, despite sharing a genetic connection with him;[107] intercountry adoption was the only avenue which remained open to them to pursue to establish a parental relationship to A. Similarly to *Paradiso and Campanelli v. Italy*, this case demonstrates the precarious nature of the child's family relations and genetic identity preservation in ICS situations. A will never be able to preserve his genetic identity and related sub-elements; his birth certificate effectively confirms this lack of preservation, stating his surrogate mother as his mother, along with 'unknown' in the 'father' field. There will remain a large part of his personal narrative that will never be able to be preserved as a result of the impossibility of gaining information which preserves his genetic and associated cultural identity elements.

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To date, relatively little explicit judicial attention has been given to the child's Article 8 right in situations concerning ICS children before domestic courts and regional human rights courts. That courts are seemingly not choosing to engage more extensively with this aspect of the child's rights is unfortunate. Article 8 provides a clear basis for Courts to do so, and given the centrality of the child's right to preserve their identity to their best interests in ICS, the child's Article 8 right should receive judicial attention in all ICS cases. Where possible, courts should seek reports on this issue from independent experts, and highlight the findings of such reports in judgments. This would emphasise the significance of the child's Article 8 right in this context and highlight the need to take steps to protect and uphold the child's identity preservation right. In the regional arena, the European Court of Human Rights has been the only court to engage with the issue in its *Mennesson*, *Labassee* and *Paradiso* judgments. In the domestic sphere, the Australian jurisdiction currently leads the way in terms of explicit judicial consideration of this issue. In a number of

104 *In the Matter of an Application by DMW and KW to adopt a male child* [2012] NZFC 2915.
105 Ibid. at para 2.
106 Ibid. at paras 5-6.
107 Ibid. at para 10.

recent ICS judgments, Australian courts have drawn attention to the issue, emphasising the importance of protecting the of the child's ability to preserve their identity in ICS situations. Three leading cases are illustrative in this connection.

Mason & Mason and Anor[108] is the leading authority in this respect, concerning E and W, twins born to an Indian surrogate in India and Australian male commissioning parents. The twins are genetically the children of one of the commissioning fathers and an anonymous egg donor. The Australian Family Court's judgment considers the twin's identity and their best interests from a number of perspectives, referencing the findings of a report by a family consultant to the Court (all of which the Court accepted). The consultant noted the twins may, at some stage in their life, have 'an intense, emotional identity crisis'[109] relating to the fact they were born through a surrogacy arrangement 'by mothers they are unlikely to know'.[110] They will face issues in their lives 'however well-armed with positive parent-child relationships.'[111] Despite this, the consultant noted the commissioning parents commitment (at the time of her report) to openness regarding the children's situation may be 'a protective factor for the twins, alongside the development of secure and healthy parent-child relationships',[112] combined with the fact the commissioning parents had actively sought to connect with families in similar positions, which may lead to positive friendship groups over time.[113] Amongst the issues the twins will face, however, the consultant identified 'the cultural issues from being genetically half Indian'[114] and 'identity issues from having no or very limited contact with their donor mother and their surrogate mother'.[115] Further relating to the twin's cultural identity, the family consultant said that they may benefit from spending time amongst Indian families in Australia, such as though Indian festivals and celebrations.[116] The consultant stated '…The diversity of Indian culture means the different experience according to religious background, and this may be an issue the children will want to explore at some point.'[117] She went on to observe that as in adoption,

> 'the twins may potentially face a more complicated task of making sense of their place in the world because they have grown up in a family whose parents faces do not look like theirs and without experiencing their "mother", and her culture. There may be times in the children's lives when they will be pre-occupied with

108 *Mason & Mason and Anor*, [2013] FamCA 424.
109 Ibid. at para 67.
110 Ibid.
111 Ibid. at para 64.
112 Ibid. at para 67.
113 Ibid.
114 Ibid. at para 64.
115 Ibid.
116 Ibid. at para 66.
117 Ibid.

> this task. They may seek contact with their mothers at significant life cycle transitions. It is also possible that it may never be an issue for the twins.'[118]

The consultant drew attention to the argument that 'a child's genetic identity forms part of a child's history.'[119] She said that

> 'There may be medical advantages in the children knowing their parentage. The donor mother and [the birth mother] and their families will, apparently, be unlikely and/or unable to seek out [the children]. There may be significant class issues separating the families which may well be apparent to the children as they explore their Indian backgrounds further. The twins may realise that their mothers and any half siblings experienced life very differently to them.'[120]

Regarding the latter point, the family consultant said that this was something the twin's commissioning parents could help them to understand and approach.[121]

The second Australian case, *Ellison and Anor & Karnchanit*,[122] although not including as extensive emphasis on identity issues as *Mason & Mason*, does focus on the significant nature of the impact of not preserving elements of the child's identity in ICS situations. *Ellison* concerns twins born in Thailand to a Thai surrogate mother and Australian commissioning parents, Mr Ellison and Ms Solano. They are the genetic children of Mr Ellison and an anonymous egg donor. The Australian Family Court held that granting a declaration of legal parentage to Mr Ellison was appropriate as it recognised the reality of the children's lives and their genetic link to their biological father[123] and 'may well be of the greatest significance to the child in establishing his or her lifetime identity.'[124] Yet the Court acknowledged that the twins share half their genetic identity with their genetic mother, who it observed will most likely remain unknown.[125] The Court elaborated that 'Although it is almost certain that the children will never know their biological or birth mother, it is not within the Court or the applicants' power to coerce those women to establish or maintain a relationship with the children.'[126] However, the Court was clear in its view that this 'may raise issues for the children as they mature'.[127]

118 Ibid. at para 67.
119 Ibid.
120 Ibid.
121 Ibid.
122 *Ellison and Anor & Karnchanit* [2012] FamCA 602.
123 Ibid. at para 101.
124 Ibid. at para 91.
125 Ibid. at para 115.
126 Ibid. at para 129.
127 Ibid.

Honing in further on the twin's birth mother, the Court noted she

> 'has made it plain that it is her wish not to be involved in the children's upbringing. The applicants have her contact details and are committed to maintaining contact with her if this is what she wants. They have secured her agreement that she receive photographs of the children and to meet with the applicants and children when they visit Thailand.'[128]

In this respect, it is positive that in this case the commissioning parents evidently gave thought to how to preserve the child's biological identity relating to their birth mother. Moreover, based on the report of a family consultant, the Court said it 'was clear that the applicants had given considerable thought to future issues, including those of identity and culture.'[129]

Finally, the judgment of the Family Court of Australia in the case of *Fisher-Oakley v. Kittur*[130] is representative of the overriding judicial concern being expressed from a legal perspective by the Family Court of Australia regarding children being conceived and born through ICS in general,[131] and explicitly in relation to the child's right to identity preservation in ICS situations. The case concerned a child born in India to an Indian surrogate mother and Australian commissioning parents, Mr X and Mr Y.[132] Despite no DNA evidence being put before the Court, one of the commissioning parents is said to be the child's genetic father.[133] It is unclear who the child's genetic mother is, as there is no mention of her in the judgment. However, Justice Cronin described the child's Indian birth certificate as being 'curious and unusual',[134] given it cites the name of the child's mother as 'Mrs Not Known'.[135] Further regarding the child's identity, Justice Cronin pointedly stated that:

> 'Whatever things people say about the future and their intentions, one has to be somewhat cynical about just how those things will unfold for a child born into this commercial arrangement. This is a new area for the law in an environment where science is far ahead of what lawmakers seem to be contemplating. I have no idea what this child will face in 15 years time if cultural issues arise or his issues about identity become a crisis. I have no idea what would happen in the event that the birth mother suddenly changed her mind and wanted to have some involvement in the child's future. All of those questions remain unanswered.'[136]

128 Ibid. at para 115.
129 Ibid. at para 122.
130 *Fisher-Oakley & Kittur* [2014] FamCA 123.
131 Ibid. at paras 5; 27.
132 Ibid. at para 1.
133 Ibid. at para 13.
134 Ibid. at para 16.
135 Ibid.
136 Ibid. at para 9.

6 Learning lessons from donor-conception, adoption and domestic surrogacy for the child's right to preserve identity in international commercial surrogacy situations

Against the above discussion of the importance of the right to identity preservation for children born through ICS and the reality that children conceived and born this way are not always able to exercise their Article 8 right (or have it upheld for their protection), it is useful to draw out some key lessons from donor-conception, adoption and domestic surrogacy. These are relevant to the child's identity situation in ICS given the overlap between some of the challenges in common between these alternative methods of family formation. In some instances there are directly analogous lessons to be learnt, so children conceived and born through ICS avoid experiencing the same challenges as these other groups of children have experienced.

6.1 Domestic systems of donor-conceived children and lessons for the child's right to preserve identity in ICS

Studies focussing on the experiences of donor-conceived children highlight some central emergent themes relevant in the context of the child's right to preserve identity in ICS. One such theme is the role of secrecy and non-disclosure in donor-conceived peoples' lives and its impact. For donor-conceived people, secrecy and non-disclosure appears to function at two levels: regarding information about the nature of the child's conception, and information relating to the identity of gamete donors. As Cowden observes, 'Non-disclosure generates strong risks for the donor-conceived child […] even if these risks could be mitigated, children have a right to be treated with respect and truth-telling about information regarding one's life course is intimately tied up with respect for an individual's identity.'[137] Cowden therefore rejects the argument that non-disclosure and secrecy relating to donor conceived children is acceptable on the basis of the 'no harm, no foul' rule, given the child rights rooted position that we should always engage in actions that respect the child.[138] The negative nature of secrecy and non-disclosure is borne out in empirical studies involving donor-conceived people,[139] and resonates strongly with

137 Cowden, supra n 12 at 103.

138 Ibid. at 116-118.

139 E.g. Turner and Coyle, 'What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counselling and therapy' (2000) 15 *Human Reproduction* 2041 at 2049 state that: 'A consistent finding within the study was the negative and ongoing effects of withholding secrets'; furthermore, a longitudinal study of donor-conceived people found that non-disclosure can lead to them never knowing they have genetic siblings. Golombok emphasises that research has shown the importance and significance of knowing siblings and their wider family relations for donor conceived

Freeman's assertion that the child's right to identity when born via ART is 'a right not to be deceived about one's true origins.'[140] Furthermore, a donor-conceived person's ability to seek and access information regarding their donor parent(s) hinges on an initial disclosure of information about the true nature of their conception.[141] If children in ICS are not informed about the nature of their conception and birth, their ability to seek and access information to preserve their identity will be similarly compromised; Tobin observes that contemporary research 'appears to favour a climate of openness and honesty rather than secrecy and denial with respect to children who are raised in families where their social parents are not necessarily their biological parents.'[142]

Access to identity information is the second level at which secrecy and non-disclosure function in the lives of donor-conceived people. Moreover, ensuring donor-conceived persons are able to access identifying information appears to be crucial so they can preserve their own identity.[143] Drawing

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persons: Golombok, *Modern Families* (2015) 112-114. See also Golombok, 'Families created by reproductive donation' (2013) 7 *Child Development Perspectives* 61-65. Blyth notes that participants in one study of donor-conceived adults 'expressed very firmly that those who built their family using donor gametes should tell their child(ren) about their genetic heritage as early as possible.' See Blyth, 'Discovering the 'Facts of Life' Following Anonymous Donor Insemination' (2012) 26 *International Journal of Law, Policy and the Family* 143 at 153. However, Golombok's study showed that whilst increasing numbers of parents intend to tell their children about their donor conception, many never make the disclosure. As Adams notes, 'the rights of donors to anonymity can still override a donor conceived person's right to information, depending on what era and jurisdiction he or she was conceived in. Additionally, the right of parents to deceive a child of his or her origins is universal in all jurisdictions and eras. In effect, the offspring's postulated right is subject to various regulations and laws as well as the choices of the participating adults. Subsequently, the freedom of procreation in this context has the potential to adversely affect the rights of donor-conceived offspring.' Adams, 'Conceptualising a Child-Centric Paradigm: Do We Have Freedom of Choice in Donor Conception Reproduction?' (2013) 10 *Bioethical Inquiry* 369 at 370.

140 Freeman, 'The New Birth Right? Identity and the Child of the Reproduction Revolution' (1996) 4 *International Journal of Children's Rights* 273 at 291.

141 As Blyth and Frith note, 'Donor-conceived people's ability to access information to which they are entitled is entirely dependent on their awareness of the nature of their conception and this is clearly compromised if parents do not tell their children about their conception in the first place.' See Blyth and Frith, 'Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity' (2009) 23 *International Journal of Law, Policy and the Family* 174 at 185.

142 Tobin, supra n 26 at 43.

143 Turner and Coyle, supra n 139 at 2047. This study found that non-identifying information was insufficient, as without it donor-conceived participants experienced loss and grief about being prevented from knowing their biological origins and knowing their genetic fathers. They believed they had a right to search for and receive identifying information about their missing genetic parent, and also experienced a sense of abandonment and attributed responsibility to their donor fathers and medical professionals (at 2050).

on testimony from donor-conceived people,[144] Cowden further notes that preventing a child from accessing identifying information can lead to psychological harm and loss of identity, described as 'genealogical bewilderment' arising from being prevented from knowing the part of the identity they inherit through genetics and biology.[145] On the other hand, through enabling donor-conceived people to access identifying information about their donor parent(s), they can fill a void that was once empty and establish their own sense of identity.[146]

There are strong parallels to be drawn between the lessons from donor-conception and the situation faced by children born through ICS regarding the protection of their Article 8 right. These clearly relate to the genetic and personal narrative elements of the child's identity. The lesson from donor-conception that secrecy and non-disclosure regarding the child's conception cuts against the concept of respect for children and their best interests – and may cause children harm – equally applies in ICS. As Tobin notes, the CRC Committee's statements regarding the inconsistency between the child's right to know their genetic origins and national regimes permitting anonymous gamete donation indicate the Committee's 'strong presumption in favour of the full disclosure of a child's genetic/biological parents'.[147]

Furthermore, the other lesson from donor-conception, that donor-conceived people should have identifying information about their genetic parents (or at least information which allows them to understand their genetic origins) protected for them so they can access it, is crucial to bear in mind in ICS. However, for children born through ICS, as well as information about their genetic parents, they should also be able to access information about the woman who carries them biologically and births them. As with donor-conception, in ICS it will be necessary for children to first learn about the circumstances of their conception and birth in order to then have the choice whether to seek access to information preserving their identity. Here, the child's social parents (most likely their commissioning parents) and identity information protection and access systems will have critical roles to play.

144 Cowden, supra n 12 at 110.

145 Ibid. at 109-110.

146 Ibid. at 111. The findings of Blyth's study involving donor-conceived adults support this view. This group strongly advocated for the use of gametes only from donors willing to be identified by their offspring. Some study participants advocated including relevant information about their donor parent(s) on birth registration documents in instances where privacy could be maintained and it would not preclude them from choosing to tell others about the nature of their conception on their own terms. See Blyth, supra n 139 at 153.

147 Tobin, supra n 26 at 37.

6.2 Adoption systems and lessons for the child's right to preserve identity in ICS

A sea-change has occurred over the past twenty years in adoption practice regarding child identity preservation, with a near world-wide shift from closed to open adoption systems.[148] Marshall, contrasting this openness with the fact that donor-conception systems in many states continue to be characterised by their closed, anonymous nature, says the global experience of adoption 'suggests a strong encouragement to tell children about the way they were conceived.'[149] Fortin elaborates that knowing about their birth circumstances as soon as possible provides the child a sense of continuity, their own biography, and alleviates the negative impact of bewilderment later in life caused by concealing the truth.[150] Fortin further notes that 'Research carried out in the context of adoption practice suggests that adopted children have a psychological need to know the true identity of those who brought them into the world.'[151]

Although there are limits to drawing analogies between adoption and ICS given that adoption is a protective measure concerning pre-existing children, whereas ICS is a practice which itself creates new children, such an approach based on openness is equally applicable to donor-conceived children and children born through ICS. The 'genealogical bewilderment' children can experience when they grow up in the care of people who are not their birth parents but discover the real circumstances of their birth and infancy was first articulated by Sants in 1964, continues to hold value in our current day context.[152] The situation of children placed for adoption either from birth or early infancy is particularly relevant to the child's right to preserve identity in ICS. As Brodzinsky et al assert, 'When children are placed in infancy, they have no memory of the birth parents and may have little or no access to information about them. In these situations, what is lost is also unknown, which too often sets the stage for the development of distorted perceptions about one's background.'[153] For a child conceived with the gamete(s) of donors and born to a surrogate through ICS, and for whom these elements of their identity are

148 Richards notes that 'Adoption research and current practice recognise that acknowledging biological heritage is in a child's best interest. This contrasts with earlier held views, where many people believed it was best to hide children's origins'. See Richards, 'What the map cuts up the story cuts across: Narratives of belonging in intercountry adoption' (2012) 36 *Adoption and Fostering* 104 at 107.

149 Marshall, *Human Rights Law and Personal Identity* (2014) at 125.

150 Fortin, *Children's Rights and the Developing Law* (2003) at 383.

151 Ibid.

152 Sants, 'Genealogical bewilderment in children with substitute parents' (1964) 37 *British Journal of Medical Psychology*, 113-141.

153 Brodzinsky et al, *Children's Adjustment to Adoption: Developmental and Clinical Issues* (1998) at 99.

not preserved, creating this empty genealogical space may well lead to problems for the child regarding their identity preservation.

Brodzinsky et al highlight that many adoptees not only lack information about and a relationship with their birth parents, but are also negatively impacted by their perception of the circumstances surrounding the 'relinquishment decision'.[154] This may bear out in the experience of children born through ICS too, who may seek answers to questions such as 'why didn't my birth mother and my genetic parents want me?' or 'why did they choose to be involved with creating me, only for me to be given away?'. On the other hand, while it may be relatively common for children who were voluntarily placed for adoption to feel they were rejected or unwanted by their birth parents[155] and for this to have an impact on the preservation of their identity, this may actually be less likely or be experienced differently by ICS children. Unlike adopted children, children in ICS are intentionally conceived for the commissioning parents on the basis of their desire to have a child. Contrastingly, when a child is voluntarily placed for adoption, the child may in fact, for various reasons, be unwanted by his or her birth parents. In adoption, the child's ability to preserve a 'stable and consolidated identity'[156] in part relies on the manner in which adoptive parents 'portray the birth family and the circumstances of the relinquishment'.[157]

The importance and impact of origin and biological narratives has also been highlighted in the adoption context. Regarding the concept of a biogenetic narrative, Lifton asserts that this 'is as much a part of them [a person] as their shadow; it develops with them over the years and cannot be torn away. Unless, of course, they are adopted.'[158] Lifton says that this not only removes a personal sense of identity, but also a sense of connection to the narratives of other people to whom that person is related.[159] Research has found that biological narratives are complicated by adoption; often constructed upon partial truths, speculation and regarding intercountry adoption, cultural assumptions.[160] The experience of adopted children also shows that such children may face challenges in preserving and developing personal identity given that they perceive themselves and are perceived as different.[161] For example, in the context of intercountry adoption (the form of adoption drawing the closest parallels to ICS given the common transnational element) children can find themselves in an 'ambiguous' position, 'both inside the family and

154 Ibid.
155 Ibid. at 100.
156 Ibid. at 104.
157 Ibid.
158 Lifton, *Journey of the Adopted Self: A Quest for Wholeness* (1994) at 37.
159 Ibid.
160 Richards, supra n 148 at 106.
161 Brodzinsky et al, supra n 153 at 104.

nation and outside it – as culturally and racially different.'[162] Even once children receive the nationality of their adoptive country, such children often have a complicated experience in terms of their perceptions of self from cultural, social and ethnic perspectives.[163] Children born through ICS may also find it is beyond their grasp to preserve their origins from a biological, cultural, language and ethnic perspective, given the transnational dislocation they may experience.

As already highlighted in section 4.3 of this paper, the significance of the issue of identity preservation for intercountry adoptees is made clear in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.[164] Guidance from the Hague Conference Permanent Bureau[165] on Articles 16 and 30 of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption characterises the process of adoption as lifelong, and 'When a child grows up and seeks information about his or her origins the report [concerning the child's background] will be an important resource. If items such as photographs of the biological family and their home or community are included in the report, they will be treasured by an adopted person who is searching for his or her origins.'[166] Furthermore, the Permanent Bureau notes 'There are benefits in trying to gather as much information on the child's background as possible: it is in the child's best interests to have all relevant information in the social and medical reports; it improves matching for families; it allows prospective adoptive parents to make an informed decision about accepting the proposed child; it becomes a future resource for that specific child.'[167] It also states that the child, as well as their adoptive parents, has an interest in 'obtaining a full and accurate medical report on the child',[168] and steps should be taken by states parties to ensure the information gathered and included in the wider report about the child is as accurate as possible.[169] Completeness of information is important, given 'The demand by adult adoptees for information about their origins is significant. Those whose background information is incomplete or non-existent may never find the answers they seek.'[170]

Whilst children born through ICS will face many of these challenges to identity preservation highlighted by the Permanent Bureau regarding inter-

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162 Yngvesson, *Belonging in an Adopted World: Race, Identity and Transnational Adoption* (2010) at 9.
163 Howell, *The Kinning of Foreigners: Transnational Adoption in a Global Perspective* (2006) at 124.
164 Supra n 42.
165 Hague Conference on Private International Law, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice, Guide No. 1* (2008).
166 Ibid. at 84 para 340.
167 Ibid. at 84-85 at para. 342
168 Ibid. at 85 at para 346.
169 Ibid at 85 at para 345.
170 Ibid. at 127 at para 589.

country adoption – including in relation to their cultural identity elements – no system of identity preservation and protection exists for children born through ICS. Yet the very fact of the existence and coverage of such a system in intercountry adoption is a strong signal that a system of identity information preservation, protection and access is necessary in the context of ICS, to uphold the child's Article 8 right under the CRC.

6.3 Domestic surrogacy and lessons for the child's right to preserve identity in ICS

Golombok observes that surrogacy presents some additional and sometimes different challenges to adoption or donor-conception; for example, 'it is not known how children will feel when they discover that their gestational mother, who may also be their genetic mother, had conceived them with the specific intention of relinquishing them to the commissioning parents.'[171] However, unlike with adoption and donor-conception, little research exists regarding child identity in surrogacy. One longitudinal study has been conducted including the perspective of children born through domestic surrogacy.[172] It presents limited findings regarding child identity; the authors acknowledge further research is needed before firm conclusions can be drawn, noting 'It is essential to explore how these children feel as they enter adolescence when issues relating to identity become of prime concern.'[173] However, the most recent findings from this study focus on the child's understanding of their surrogacy, parental disclosure decisions, and relationships between the surrogate mother, the child and their commissioning parents. Regarding disclosure, at age 10, 30 of 33 children had been informed of their birth circumstances; the parents of three children were still planning to disclose this.[174] All 19 children who were genetically related to their surrogate mother had been informed about their surrogacy and 11 of them had been informed their surrogate mother is their genetic mother.[175] Commissioning parents of six children still planned to disclose this fact to the child;[176] two children's

171 Golombok, 'Families created by reproductive donation' (2013) 7 *Child Development Perspectives* 61-65 at 62.

172 Jadva et al, 'Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins' (2012) 27 *Human Reproduction* 3008-3014.

173 Ibid. at 3013.

174 Ibid. at 3011.

175 Ibid.

176 Ibid. However, at 3013 the study's authors note that 'it remains to be seen whether parent's intention to tell their child will translate to actual disclosure in the future. By withholding this information, parents are creating a potentially difficult situation whereby they feel they have disclosed the nature of the child's birth but the child does not know the full story.'

parents' decided not to disclose this to them.[177] The study's authors state 'the fact that most parents who used a genetic surrogate mother had not yet disclosed the use of the surrogate mother's egg is notable, as children who later find out may wonder why this information was deliberately withheld from them.'[178]

By the age of seven, the study found most children who know about their birth through surrogacy are able to show some understanding of this, and by age 10, 67 percent of the participant children felt neutral or indifferent about their birth through surrogacy.[179] This contrasts with seven year old donor-conceived children, who have been shown to have little understanding of their birth circumstances.[180] Considering the issue of contact with the surrogate mother, despite many families maintaining contact, it decreases over time;[181] this is especially the case where the surrogate is the child's genetic mother but was unknown to the family prior to the surrogacy.[182] However, children 'spoke of the surrogate's altruistic motivations for helping parents, which raises questions about how children will feel in situations where their surrogate mothers was (sic) reimbursed financially.'[183] One other study involving children born through domestic surrogacy is worth briefly mentioning in this connection.[184] It found at age seven, surrogate children experienced higher levels of adjustment problems than children conceived by gamete donation, 'suggesting that the absence of a gestational connection between parents and their child may be more problematic for children than the absence of a genetic relationship.'[185] In ICS too, for some children the absence of both a genetic and gestational connection, together with the overlay of the potential trans-national disconnection imposed on the child, has potential to cause similar challenges to the child's Article 8 right.

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177 Ibid. at 3011. One of the commissioning mothers said this information was irrelevant, and the other said the child would only be told in the future if they asked themselves.

178 Ibid. at 3013.

179 Ibid. at 3012.

180 Blake et al, 'Daddy ran out of tadpoles: how parents tell their children that they are donor conceived, and what their 7-year olds understand' (2010) 25 *Human Reproduction* 2527-2534.

181 Jadva et al supra n 172 at 3012.

182 Ibid.

183 Ibid. at 3013.

184 Golombok et al, 'Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54 *Journal of Child Psychology and Psychiatry* 653-660.The study focuses on parenting and children's adjustment, examining 30 surrogacy families, as well as 31 egg donation families, 35 donor insemination families, and 53 families with naturally conceived children.

185 Ibid. at 653.

The key lessons highlighted in this section regarding identity preservation in donor-conception, adoption and domestic surrogacy signal that a cautionary approach is necessary in ICS to enable children to exercise their Article 8 right. The experiences of these three methods of alternative family formation emphasise the importance of children being able to preserve their identity, and show that the genetic and biological, personal narrative and cultural elements of identity are particularly important for children in these situations. Some direct parallels can be drawn with the child's identity preservation situation in ICS arrangements, given that ICS brings together these challenges to the child's identity right under Article 8 of the CRC, placing it in peril.

7 Proposing practical measures of implementation of Article 8 for children in international commercial surrogacy

Article 8(1) CRC refers to 'the right of the child to preserve his or her identity', but because the child lacks agency to preserve their own identity during infancy (at least), and given that in ICS it is during the child's infancy that crucial steps to preserve the child's identity must be taken, the child is essentially reliant on others to safeguard and give effect to their Article 8 right. Indeed, children cannot remember elements of their identity at this time of their lives. For these reasons, this section focuses on actions for implementing Article 8 in ICS to be taken by persons other than the child themselves. These are framed drawing on the preceding discussion in section 6 regarding lessons from donor-conception, adoption and domestic surrogacy, and applying this to the specific context and challenges regarding the child's right to preserve their identity raised by ICS. The ideas outlined below centre around three actors: commissioning parents, medical professionals and the state.

Whilst these measures focus on enabling children to preserve their identities to the fullest extent possible in ICS, it is acknowledged that because of the nature of their conception and birth and the ways in which ICS is currently sometimes practised (involving anonymity), preserving some elements of identity will remain beyond the reach of some children in ICS, breaching their Article 8 right. However, through the commentary below, an ideal state is indicated regarding protection of the child's Article 8 right in ICS, thereby outlining what could constitute best practice.

7.1 Commissioning parents and medical professionals: a first line of defence in preserving child identity in International Commercial Surrogacy

A crucial first step in ensuring the child's Article 8 right is protected is educating commissioning parents and medical professionals about this aspect of the child's rights in ICS, and the role they can play in ensuring the child's Article

8 right is upheld. In ICS, commissioning parents and medical professionals are ideally placed to take actions contributing towards the child's ability to preserve their identity. In doing so, both parties can ensure actions and decisions relating to the child are consistent with the child's best interests.

Prior to a child's conception in ICS and prior to and following their birth, commissioning parents can advocate and take actions for the preservation of all elements of the child's identity. In doing so, commissioning parents will act in line with their responsibility under Article 18(1) to treat the best interests of the child as their basic concern.[186] If commissioning parents are educated about the child's Article 8 right, understand the importance of identity preservation for the child and the role they can play to enable this, they are powerfully positioned to ensure their ICS arrangement will uphold rather than risk breaching the child's Article 8 right. In practice, this ideally means:

- commissioning parents only enter into ICS arrangements enabling preservation of all elements of the child's identity, namely ICS arrangements involving the use of identifiable gamete donors, an identifiable surrogate mother, and medical professionals/surrogacy clinics with systems established and functioning to collect, store and protect information regarding elements of the child's identity, consistent with the child's Article 8 right; and
- commissioning parents advocate for all elements of the child's identity to be preserved through the collection, storage and protection of all identity-related information pertaining to the child, and wherever possible take steps to do this themselves.

Once a child is born through ICS, commissioning parents have an extremely influential role to play in preserving the child's identity in an on-going manner, in accordance with the child's evolving capacities.[187] As Lansdown states, 'The concept of evolving capacities is central to the balance embodied in the Convention between recognising children as active agents in their own lives, entitled to be listened to, respected and granted increasing autonomy in the exercise of rights, while also being entitled to protection in accordance with their relative immaturity and youth.'[188] Therefore, at times appropriate in line with the child's evolving capacities, commissioning parents can support

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186 Article 18(1) CRC: "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

187 Article 5 CRC: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

188 Lansdown, *The Evolving Capacities of the Child*, 2005, at 3.

the child in developing, understanding and thereby preserving their own identity. This can be done by sharing identity information with them or supporting the child to access this information. This may be a gradual process; for example, non-identifying information may in the first instance be the most important to protect for the child, if it relates to their health status in relation to their genetic parents. However, sharing identity information with the child should include informing the child about the nature of their conception and birth through ICS at a time when the child has the capacity to begin to understand this information, and supporting the child to understand this aspect of their identity. As Lansdown observes, direction and guidance provided to the child by their parents 'must be directed towards promoting respect for the rights of the child, and parents must respect the extent to which the child is capable of exercising those rights on his or her own behalf.'[189]

Similar to commissioning parents, in ICS arrangements medical professionals occupy a powerful position regarding the child's right to identity preservation. Medical professionals should contribute their services and expertise to ICS arrangements in ways enabling, not precluding, the child's Article 8 right to be upheld. In ICS arrangements, aside from surrogacy brokers and agencies, medical professionals are likely to be the first point of potential collection of identity-related information about third parties relating to the child. How medical professionals involved in ICS collect, protect and store such information has long-term implications for the preservation of the child's identity and therefore their best interests.

To ensure all elements of the child's identity are preserved, medical professionals should only facilitate ICS arrangements involving the use of gametes and embryos from identifiable (that is, non-anonymous) donors who are willing to have contact with the child in future and identifiable surrogate mothers (acting non-anonymously and willing to be contacted by the child). This will mean the child's genetic identity and biological identity elements are preserved. Medical professionals should take the further steps of collecting, storing and facilitating the child's access[190] to the following information to enable the child to preserve their identity:

- Regarding the child's genetic parents (gamete donors/embryo donors):
  - Full name
  - Date of birth
  - Ethnicity and language spoken
  - Current physical address, phone number, email address where available
  - Significant health history (pertaining directly to the third party in question and their family history)
  - The age and sex of any pre-existing genetic children

189 Ibid. at 6.

190 Access to such information would only be available for the child, on a confidential basis.

- Regarding the child's birth mother:
  - Full name
  - Date of birth
  - Ethnicity and language spoken
  - Current physical address, phone number, email address where available
  - Significant health history relating to term of pregnancy and child-birth, insofar as it could impact the child's health, as well as any significant health history of pre-existing serious disease or medical condition

Whilst gamete and embryo donors and women acting as surrogate mothers have a right to privacy,[191] in order for the child's right to preserve their identity to be upheld consistent with their best interests, ideally ICS arrangements should only take place on the basis that all donors and surrogates are involved having agreed to provide the above mentioned information to the medical professional/surrogacy clinic as well as directly to the commissioning parents, and to keep this update in future so it remains accurate for the child. The balance of competing rights in this respect will, consistent with protecting the child's rights, largely tip in favour of protecting the child's identity right over the privacy rights of adult parties involved in ICS.

Medical professionals should also collect, store and facilitate the child's access to all identity information available which is directly about the child themselves. A formal record should be created and made available to the child reflecting the particulars of their circumstances of birth, such as the place, time, date and the full names of every person present at their birth; the details of the child's genetic make-up and the medical procedures undertaken to conceive the child (for example, IVF, embryo implantation); and the particulars or a description of the child's health status at birth. This may be more comprehensive information than what a child born in non-ICS circumstances may have collected and protected on their behalf. However, the preservation of this kind of information about children born through ICS may be particularly important in helping preserve their identity, as they may face challenges in preserving their identity given their circumstances of conception and birth through ICS.

Medical professionals/surrogacy clinics should compile all the above information pertaining to the child's identity in an identity dossier for them, providing a copy to the child's commissioning parents as soon as practicable following the child's birth. A full copy of this identity dossier should be stored in perpetuity (or until such time that it is accessed by the child) at the surrogacy clinic/by the medical professional overseeing the ICS arrangement, in order to allow the child the opportunity to be able to access this information in future in order to preserve their identity in instances where this information is not made available to them by their commissioning parents. The medical

191 Article 17, International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

professional/surrogacy clinic should facilitate the child's access to this information.

By undertaking the actions outlined above, commissioning parents and medical professionals involved in ICS can significantly contribute to helping the child preserve their identity. Acting as a first line of defence, the actions they take could be the difference between elements of the child's identity being preserved or not, with implications for the child's best interests and lifelong impact. However, whilst commissioning parents and medical professionals can take steps to enable the preservation of a child's identity in ICS consistent with their Article 8 right, such actions will be difficult to universally implement. What has been discussed above is a best practice blueprint. For example, without an international regulatory system covering surrogacy clinics and medical professionals (including monitoring and enforcement measures), it is unlikely that protective measures of the nature outlined above will be taken in the ICS industry. This is given the unfortunate reality that the incentive of protecting the child's rights pales against the financial gains to be made through the ICS industry. Therefore, as long as the absence of international agreement and regulation of ICS persists, an important role remains for the state, in order to protect the Article 8 right of children conceived and born through ICS.

7.2 The state's role in protecting the child's right to preserve their identity in International Commercial Surrogacy

It is clear that under Article 8(1) CRC, the state is obliged to respect the child's right to preserve their identity. Furthermore, under Article 8(2), the state is obliged to provide children with appropriate assistance and protection to assist them in re-establishing their identity speedily in situations where they are illegally deprived of some or all the elements of their identity. Although an argument can be made that a child conceived and born through ICS who is unable to exercise their right to preserve their identity is subject to an illegal deprivation of some or all elements of their identity, it is a longbow to draw. However, the state does have a significant role to play in ICS situations to ensure that all elements of the child's identity are preserved. After all, 'The State is empowered to intervene to protect the rights of the child, in recognition that the best interests of children are not always identical with those of parents, and will not always be protected by parents.'[192] It is wholly appropriate to interpret Article 8 in a dynamic manner taking into consideration the current-day context of ICS; in this respect, considering Article 8(2), it is not difficult envisage the possibility of persons currently being conceived and born through ICS mounting a legal challenge in 20 years' time against the states involved,

192 Supra n 188.

on the basis that they were unable to preserve their identity and deprived of some or all the elements of their identity. Such a challenge may have merit in ICS situations where the state omits to take actions to assist and protect the child's re-establishment of their identity.[193]

To have the best possible chance of enabling the full preservation of the identity of all children born through ICS, building on the best practice blueprint discussed above regarding commissioning parents and medical professionals/clinics, ideally this would also involve individual state action outlawing the conception of children in ICS through the use of gametes or embryos from anonymous donors, as well as outlawing ICS arrangements involving anonymous surrogate mothers. If such laws are implemented and enforced through active monitoring of the ICS industry at the domestic and international levels, they will help ensure ICS occurs on the basis that children will, at a minimum, have the ability to know the identity of their genetic parents and the person who biologically brought them to term. However, realistically it must be acknowledged that this currently remains an unlikely prospect. Given the continued demand for ICS and the economic benefits to supply states, some states will continue to allow the practice of ICS to continue in their territory involving both the use of anonymous gametes and embryos and anonymous surrogate mothers. Therefore given the persisting status quo in the practice of ICS, ensuring the preservation of other aspects of the child's identity becomes even more important; the role to be played by the state in upholding the child's Article 8 right through the actions suggested below is essential.

7.2.1 *Facilitating an identity dossier for every child born through International Commercial Surrogacy as an interim measure of protection*

Continuing to build on the suggested blueprint actions for medical professionals/surrogacy clinics in ICS as discussed above, the state can play a role related to the creation, storage and access to an identity dossier for every child born through ICS. Supply-states should work with medical professionals and surrogacy clinics to ensure that an identity dossier including the identity related information discussed in the previous section above is compiled in relation to and for the child. The state's primary role here is to monitor and enforce implementation of these requirements; as discussed above, the obligation on medical professionals and surrogacy clinics involved in ICS situations to compile, store and protect this information should be established in legislation and policy at the state level in supply-states.

193 Whilst not writing on ICS, Doek, supra n 15 at 13 observes that 'para 2 of Article 8 of the CRC has not been written with artificial procreation in mind. But the obligation to respect the right of the child to preserve his or her identity, requires the State Party to undertake all legislative, administrative or other measures (Article 4 of the CRC) to implement that right, interpreting it in a dynamic manner and with the present day conditions in mind.'

In ICS arrangements where anonymity is involved, supply-states should ensure that a base level of non-identifying information should be made available and collected by medical professionals and surrogacy clinics as a mandatory minimum requirement of donors' and surrogates' involvement in and the practice of ICS. Where ICS arrangements take place involving gamete or embryo donors or surrogate mothers acting anonymously, and in the absence of an overarching state policy and legislation prohibiting such practice, supply-states should at the minimum require that an identity dossier is compiled, stored and protected for all children born through ICS, including all available non-identifying information regarding gamete/embryo donors and surrogate mothers, as well as any other information of the kind outlined in the list above. The protection of such information will be important in preserving elements of the child's identity which may still be able to be preserved without identifying information about the donors and/or surrogate involved. Moreover, birth certificates should be issued for all children born through ICS by their birth-state, including accurate and complete information as far as possible regarding the child's parentage and circumstances of birth. In order to provide the child with as accurate as possible record of their birth, states should explore whether they might include a note on the birth certificates of children born through ICS arrangements which reflects this fact. In situations where one or both parents are unknown, such an annotation may be of particular importance given there will always be persistent gaps in the child's personal narrative. However, this action could in practice lead to discrimination, on the basis of birth status and through implications arising from the disclosure of such birth certificates to third parties. In light of these risks, such an action requires further consideration in future. On the other hand, it does remain a possibility that an annotation on the child's birth certificate that they were born as a result of ICS could have a protective effect for the child of enabling them to preserve one aspect of this element of their identity.

Regardless of whether ICS operates on the basis of anonymity or not, at the same time as it is given to the child's commissioning parents, supply-states should require that a copy of a child's identity dossier is provided by the medical professionals/surrogacy clinics to the state itself in order for it to be stored in a state-level, centralised repository system, especially designed for storing and protecting these dossiers for the future access of children conceived and born through ICS in that state. A system of monitoring and enforcement would need to be established to support this mechanism to work, which would require long-term commitment from states and clear and transparent guidance in legislation and/or policy. Storing identity dossier at state-level will also act as a backstop in the event of closure of surrogacy clinics, ensuring the continuity and availability of this information to children who seek it. The state should ensure information about the existence of such a system is available to donors and surrogates and encourage them to update their contact

information so children can identify and know them in the future should they wish to.

7.2.2 *Facilitating a long-term, inter-state system of protection of identity information in the context of* ICS

Beyond the interim measure of state protection for child identity preservation through the steps suggested above, ideally a hybrid public international human rights law and private international law inter-state cooperation system of identity protection should be established in future, giving all children conceived and born through ICS the best possible chance of preserving their identity. Under such a future system, at the same time as the supply-state stores a copy of an identity dossier of a child born in that state, the supply-state should transmit a copy of the identity dossier to a formally designated state-level agency in the demand-state (the home state of the child's commissioning parents). The demand-state should receive, store and protect these identity dossier at the state-level and establish a system facilitating access to the identity dossier by the children they pertain to.

Such a system of identity information storage, protection and facilitated access is similar to systems established by many states over recent years regarding identity information of children conceived through domestic donor ART.[194] However, under the ideal system of identity information protection and facilitation suggested for future use in ICS, state responsibility for upholding the child's Article 8 right would rest on both the supply and demand states in individual ICS arrangements. In the first instance, this responsibility rests with the supply-state, which has the obligation to ensure that the identity information relating to the child is preserved through collection and creating a record of that information (the child's identity dossier) and storing it. To fully exercise its responsibility, it is envisaged that the supply-state must then ensure that this record is properly transmitted to the demand-state. It is at this point that responsibility also rests with the demand-state to store that information and to facilitate the child's access to it. Such information should ideally be stored by both states in perpetuity, given the variable nature of when and where a child may seek to find and access such information.

In order to ensure that such an inter-state system of identity protection for children in ICS is adequately established and regulated in both states, an international agreement would need to be concluded, setting out exact requirements and parameters of the system.[195] This should make provision for the

194 E.g. Some states in Australia, New Zealand, the United Kingdom, the Netherlands, Norway, Switzerland, Sweden.

195 Currently, the forum through which the only such work in this regard is taking place is the Hague Conference on Private International Law and the prospect of an international agreement remains very much in its infancy. However, the Permanent Bureau of the Hague

balancing of privacy rights of genetic and biological parents in ICS (that is, genetic donor parents and surrogate mothers) with the child's Article 8 right and best interests, and should be framed with reference to the concept of the evolving capacities of the child. Both demand and supply states that ratify such an international agreement should further enact domestic legislation reflecting their obligations pursuant to the international agreement, the rules under which information can be accessed within its jurisdiction and the limitations on sharing or amending the information contained in ICS identity dossier.

As with the experience of adoption and domestic donor-conception, such a system will only work in practice for children born through ICS if they know about their conception and birth through ICS. Otherwise, such a system of identity information protection and access will have little practical meaning for the children it aims to protect. In this connection it is important to once again acknowledge the powerful position occupied by commissioning parents in ICS arrangements; a choice by commissioning parents to share or not share identity related information with the child as their capacities evolve will likely have lifetime implications for the child's preservation of their identity.

8 Conclusion: Answering the "Who Am I?" Question in International Commercial Surrogacy Situations

As discussed in this paper, the child's right to preserve their identity under Article 8 of the CRC is a right of central and heightened importance to all children conceived and born through ICS. Identity is a concept built from a range of elements, some evolving over time. The child's right to identity preservation is one of the child's rights most at-risk in the context of ICS, as illustrated through this paper by honing in on particularly at-risk elements of the child's identity: genetic and biological, personal narrative and cultural. Despite this, it is a right which has significant, lifetime implications for children and their understanding of their place in the world and how they make sense of who they are. For these reasons, we should understand the child's Article 8 right as being at the heart of the child's best interests when conceived and born through ICS. Although the practice of ICS was not foreseen by the CRC framers, the possibility of ICS being dealt with under the CRC was left open; we must interpret the CRC as living document, applying its safeguards to the

Conference has undertaken comprehensive work providing a platform for Hague Conference Member States to begin discussing the feasibility and viability of further work towards a possible international convention regarding international surrogacy. See Hague Conference, 'The private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements' available at: www.hcch.net/index_en.php?act=text.display&tid=178 [last accessed 01 June 2015].

child in the context of the contemporary practice of family formation through ICS.

Such an interpretative approach ensures we view the child's identity preservation rights holistically, with identity comprised of multifaceted elements spanning, for example, the genetic, biological, cultural, ethnic and social. Importantly, Article 8 of the CRC is about the preservation of identity; it seeks to ensure that pathways are open for the child to form their whole identity, through preserving all elements of their identity. Indeed, this approach is child rights-consistent, as has been signalled by the Committee on the Rights of the Child in its limited comments regarding ICS to date. In ICS, the experience of each child regarding identity preservation will be different and highly personal. To address the challenges of ensuring protection for the child's identity preservation right in ICS, there is a long-term need for a system of international regulation; this is a necessary goal given the challenges to the child's Article 8 right in ICS are international in nature, often with three or more states involved in ICS arrangements, requiring an ultimately international solution.

However, drawing on lessons from adoption, donor-conception and domestic surrogacy, it is clear that certain actions can be taken now, despite the current lack of a system of international regulation, through a range of actors in ICS taking steps contributing towards upholding the child's Article 8 right. Such actions can help to ensure that as many pathways as possible to the child's full preservation of identity remain open through the collection, storage of and access to identity related information. This will ensure such children are able to preserve their identity as far as possible at any time following their birth, should they wish to. A particular focus should rest on actions directed towards ensuring that children can know about and understand the reality of their childhood and how they came into existence, as elements of identity are established and forged during this time which can impact and influence the child's future. Such an approach seeks to protect the child's best interests; after all, children born through ICS have, as one judge observes, 'done nothing wrong'.[196] They did not choose the means of their conception and birth. Yet the reality remains that children conceived and born through ICS are intentionally conceived and born this way. The corollary of this intentional adult action should be that intentional, comprehensive steps are taken by those directly involved in ICS arrangements consistent with the best interests of the child and the evolving capacities of the child, as well as CRC States Parties, to uphold the child's Article 8 right in all ICS arrangements.

Already, children have been born through ICS who will never be able to preserve the genetic element of their identity; time will reveal the impact of this reality on these children, unable to know their family relations pertaining to their genetic parents and half-siblings. Now however, at the very least, we

196 *Ellison*, supra n 122 at para 92.

should be taking steps along the lines suggested in this paper to ensure that all future children born through ICS have their right to preserve their identity respected and given effect to in practice. Taking actions and decisions consistent with Article 8 of the CRC will give children born through ICS the opportunity to live lives built on an informed understanding of how they came to be, who they are, and how this has and may continue to shape their place in the world. Not taking such steps will lead to a globally-dispersed generation of children born through ICS who may find themselves asking "Who am I?" for the rest of their lives.

9 Case Analysis

Children's Rights to the Fore in the European Court of Human Rights' First International Surrogacy Judgments

Abstract

As the world's foremost regional human rights court, it was only a matter of time before the European Court of Human Rights would confront applications concerning ICS situations. The Court did so in its first international surrogacy judgments: *Mennesson v. France* and *Labassee v. France*. Given the treatment of the rights of the children involved in those cases and the findings therein, this Chapter spotlights these judgments and provides analysis of the findings of the Court. By taking a strong child-centred approach, the Court highlighted the vulnerability of children in ICS arrangements. Significantly, the Court's judgments focus on the child's rights to nationality and identity; therefore, the discussion presented in the case analysis builds on the previous two chapters of this study, providing a further opportunity through which to view these rights of the child in the practical ICS context. This Chapter discusses the impact of these judgments in Europe and internationally, as Governments grapple with the complexities and impacts of ICS arrangements, in particular relating to the rights of children born through this new method of family formation. Although the Grand Chamber of the European Court of Human Rights has dealt with subsequent applications concerning ICS since passing the judgments this Chapter focuses on, the discussion presented in this Chapter provides insight into the reasoning of a judicial body grappling with ICS as a novel issue. It highlights the roots of the Court's approach in relation to some of the child rights dimensions raised by ICS.

Main Findings

- The findings of the Chamber of the European Court of Human Rights in the *Mennesson* and *Labassee* judgments emphasise that the child's right to identity is of central importance to the right to respect for private life under Article 8 of the European Convention on Human Rights.
- The Court observed that nationality is an important element of identity, and that uncertainty regarding ones' ability to acquire nationality can negatively impact on identity formation.
- In the judgments, the Court attached significant weight to the biological link (based on DNA) between the children and their commissioning fathers,

saying this is another element of identity and that it was not in the children's best interests to deny legal recognition of this link.
- The Court held that the balance struck between the children's best interests and the other interests at stake – including the public interests that the French Government argued it was seeking to protect – was incorrect, because the children's best interests were not satisfactorily upheld.
- These judgments can be understood as strong children's rights judgments, owing to the Court's approach to examining the practical reality of the children's situations, and considering their circumstances in relation to their commissioning parents, with the Court placing a primary focus on what was in the children's best interests.

Contextual notes

- Since the time of writing this Chapter, in January 2017 the Grand Chamber of the European Court of Human Rights issued its first ICS judgment, in *Paradiso and Campanelli v. Italy.*
- Given the significance of the Grand Chamber's judgment in the development of ICS jurisprudence, an Addendum to Chapter Nine is included as part of this doctoral thesis, presenting an overview of the Grand Chamber's decision and brief analysis of the judgment from a child rights perspective.

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1 Introduction

The concept of 'family', including how it is formed and structured continues to change and evolve in the twenty-first century, largely facilitated through scientific and technological advances and enabled by shifting attitudes and greater societal acceptance of new versions of what it means to have and be part of a family. Sitting within this wider context, international commercial surrogacy (ICS) has developed over the past decade as a significant issue in international family law. Increasingly however, it demands recognition as a complex human rights challenge. This is particularly the case regarding the rights of children in ICS arrangements, given that their rights are acutely at risk due to the circumstances of their conception and birth in this manner. The human rights of women are also jeopardised through ICS, given the central role they play as surrogate mothers in such situations. Their involvement is often by virtue of their own economic marginalisation and in the context of a supply and demand situation whereby commissioning parents from more developed countries (as is the tendency) are reliant on the reproductive function of such women to have children through ICS. National courts in many

jurisdictions world-wide have been wading into ICS cases for some years now, albeit largely reluctantly given the abundance of ethical, legal and rights-based issues involved, and the associated difficulties in applying out-moded national legislation, ill-suited to the complexities of such matters.

However, the human rights issues raised by ICS situations have been notably absent amongst cases reported from regional human rights systems and courts. Given this, the recent judgments of the European Court of Human Rights in the joint Chamber applications of *Mennesson v. France* (Application No.61592/11)[1] and *Labassee v. France* (Application No.65941/11)[2] represent a turning point in international surrogacy jurisprudence. For the first time, the Court has adjudicated applications concerning ICS; in dealing with these applications under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[3] the Court has taken some initial steps towards confronting the human rights issues faced by many of the parties involved in ICS arrangements. Yet with its first international surrogacy judgments, the Court has resolutely established a strong platform for the significance and importance of the rights of the child in ICS situations. In relation to the issues before it, notably the Court's judgments in both *Mennesson* and *Labassee* place a clear focus on the rights of the child. In doing so, the Court has upheld the best interests and broader rights of the child in the context of the right to respect for private life under the Convention in forthright and commendable fashion, which will have an impact in France, Europe and beyond.

2 Children in limbo for over ten years

Both the *Mennesson* and *Labassee* applications concerned children born in the United States as a result of married, heterosexual French couples commissioning (separate) international commercial surrogacy arrangements with American birth mothers. In the Mennesson's case, the surrogacy arrangement with a surrogate mother in California resulted in twin girls; the Labassee's arrangement with a surrogate mother in Minnesota led to the birth of a female child. In both cases, the children are genetically related to their commissioning father, but not to their commissioning mother (the conception of the children was enabled through the use of donor oocytes). The applicants to the European Court of Human Rights in each case were the commissioning parents together with the children themselves.

1 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014.
2 *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014.
3 Convention for the Protection of Human Rights and Fundamental Freedoms (1950; CETS No.005; ECHR). The articles of the ECHR referred to in this Case Analysis refer to the ECHR as amended by Protocol No.11 and Protocol No.14.

In France, all surrogacy, whether altruistic or commercial, is illegal under Article 16-7 of the code civil. This provision is one of public order (*l'ordre public)*, aimed towards preserving and protecting the fundamental values and morals of French society. Regarding surrogacy, this is directed towards preventing the exploitation of women and their reproductive functions, and the commodification of children among other things. Breaching the French ban on surrogacy is a criminal offence, subject to imprisonment and fines. Both the Mennesson and Labasee couples experienced infertility, leading them to pursue international surrogacy. What they did not foresee was the extremely uncertain legal status that the children born through such arrangements would experience, due to the nature of their conception and birth in another state which allows surrogacy under law. In fact, these children have been in a state of legal limbo since birth: for 14 years (Mennesson twins) and 13 years (Labassee child) respectively.

'How and why did the children's uncertain legal status persist?' one may well ask. Put simply, the French Government refused to register the children's births in the French civil register (l'état civil français), blocking them from being recognised as French citizens, and leading to the children not being afforded a number of other rights and entitlements. Although the children (all of whom hold American nationality) have been allowed to enter and live in France with their commissioning parents, no legal parental relationship has been able to be established under French law. This occurred despite the existence of American court judgments (from the Supreme Court of California and the Court of the State of Minnesota) finding both sets of commissioning parents always intended to care for and raise the children as their own; that the birth mothers involved both consented to their parental rights ending with the Court judgments; and recognising the filial relationship of the commissioning parents in relation to their children under the applicable American state laws. Due to the French failure to recognise the children's relationship with their commissioning parents under French law, the odd situation has existed whereby the children have been living and growing up in France with and cared for by their commissioning parents, yet without any filial link to these people, who have been their parents – in the social sense, and in respect of the fathers, in a genetic sense – since their birth.

3 Arguments in the European Court of Human Rights

On the basis of this refusal to register the children's births in the French civil register, the applicants in *Mennesson* and *Labassee* claimed breaches of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which establishes the right to respect for family and private life. The arguments supporting these claims focussed strongly on the need for the State to make decisions concerning children consistent with its

obligations under the United Nations Convention on the Rights of the Child (CRC).[4] The applicants argued the deprivation of filiation left the children without legal protection regarding their status in their family units, and that this filiation was legitimate, based not only on the genetic link to their fathers, but also the recognition under United States law of the relationship between the children and their commissioning parents (both the fathers and mothers). The applicants pointed to the practical realities of the children being without French legal recognition, including having no certificate of French nationality, no French passport, restricted freedom of movement, lack of a valid residence permit, inferior inheritance rights, the impossibility of gaining the right to vote in France, and the burden of dealing with administrative matters related to schooling and social security as non-French children, without filial links to their commissioning parents. Along with other difficulties they faced, these things hindered their ability to have a normal family life and caused heavily disproportionate repercussions for the children.

Moreover, the applicants said the decision to refuse registration ignored the concrete circumstances of the parent-child relationship, both socially and biologically. Here, the applicants relied on the Court's Chamber judgment in *Wagner and J. M. W. L. v. Luxembourg*[5] pointing to a government failure to take into account the 'social reality' of the situation in relation to legal protection of the children. Whilst the applicants acknowledged the State benefited from a wide margin of appreciation regarding surrogacy, they argued that the requirement to take into account the best interests of the child effectively restricts the margin of appreciation. The applicants argued the refusal to register the children in the French civil register was therefore a decision not in the best interests of the child under the CRC.

In response, the French Government's arguments rested heavily on the aims underlying the prohibition of surrogacy in France, including guarding against the commodification of the human body and protecting the best interests of the child. The Government posited that surrogacy is a matter of moral order and ethics, and in the absence of consensus amongst Council of Europe High Contracting Parties, States have a wide margin of appreciation. In an argument that neatly encapsulates the legal bind that many countries are finding themselves in relating to the question of how to approach international commercial surrogacy, the French Government asserted that given the illegality of surrogacy in France, recognising the legal status of the practice outside France would amount to de-facto acceptance of an intentional circumvention of French law. This would lead to an inconsistent and therefore untenable position. The code civil must be upheld in order to prevent criminal offences against the public order; in this regard, the Government noted the genetic link between the children and their French fathers could not be

4 UNTS vol. 1577, p.3, entry into force September 2, 1990.

5 *Wagner and J. M. W. L. v. Luxembourg* (App. No.76240/01), judgment of June 28, 2007.

recognised as amounting to paternity under French law, given the evasion of the code civil which had occurred.

Regarding the practical situation of the children arising through their lack of filiation, the Government put forward the view that the commissioning parents (that is, both Mr and Mrs Mensseson and Mr and Mrs Labassee) exercise full parental authority based on the American court judgments, and administrative hurdles have been overcome satisfactorily, with family life taking place in a 'normal' manner. Moreover, the Government said the commissioning parents should not have ignored French law in the first place; in doing so, they should have been aware of the difficulties they would likely face as a result. The response of the French Government in not registering the children was therefore, according to the French Government itself, proportionate in light of the aims pursued through the law.

4 Judgments in the European Court of Human Rights

The European Court of Human Rights, faced with decision-making in the first applications concerning international commercial surrogacy before it, interestingly found that although an interference with the applicant's right to respect for their family life existed, there had not been a violation of Article 8 in this respect.[6] The Court's rationale for not finding a violation of any of the applicant's right to respect for family life is clear through the Court's weighing of the fact that the practical difficulties the families faced were not insurmountable, and the impact of the lack of filiation under French law against the State's margin of appreciation (which was wide, based on the comparative law analysis undertaken by the Court, highlighting a lack of consensus amongst Council of Europe members around surrogacy). The Court said all the children were in practice able to live as a family with their commissioning parents, from quite soon after birth; the lack of French nationality for the children did not threaten the stability of the family unit; there was no apparent risk of the authorities separating them due to the absence of filiation under French law. It was on this basis that the Court was able to find that although there was an interference with the applicant's right to respect for family life under Article 8, there was no violation in this respect; ultimately, the Cour de Cassation had struck a fair balance in its decisions, between the interests of the applicants and the State regarding respect for family life.

Regarding the right to respect for private life under Article 8 however, the Court found a violation of the children's rights (but not their parent's right

6 For the Court's reasoning for its finding that there was no violation of Article 8 regarding the right to respect for family life, see *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [87]-[95]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [66]-[74].

to respect for private life) in both cases. In making this finding, the Court placed heavy emphasis on the overriding importance of the rights of the children (albeit concerning their relationships with their parents). Costs were awarded, along with compensation to the children for moral damage (€ 5000 each).

5 Multifaceted concept of identity central to private life

Significantly, especially given none of the applicants in either case argued a violation of Article 8 connected to uncertainty around the children's identity, the Court's finding of a violation of the right to respect for the children's private lives turned heavily on the issue of their right to identity and what this entails. The Court stated that respect for private life under Article 8 of the ECHR requires that a person can establish their identity as a human being, an essential aspect of this being their filiation.[7] The denial of filiation under French law in the situations of the Mennesson and Labassee children had led to a situation of legal uncertainty for those children. The lack of legal recognition they endured amounted to an infringement on their right to identity, given its impact on their very ability to establish their identity. Furthermore, the Court importantly observed that nationality is an aspect of identity; the children faced indeterminate uncertainty regarding their ability to acquire French nationality, which the Court said was likely to negatively affect the formation of their identities.[8]

Linked to the impairment of identity through lack of filial recognition under French law, the Court found the children would be treated less favourably regarding their succession rights vis-à-vis their parents. In practice, the children would only be able to inherit from their parents as third parties, which the Court viewed as a deprivation linking to their inability to fully establish their identities.[9] The existence of a biological link between the children and their commissioning (and therefore their genetic) fathers was another significant consideration for the Court in reaching its decision that France had violated the children's rights to respect for private life. Finding that biological filiation is a further important aspect of identity, the Court said it is not in the children's best interests to deny recognition of this under law, given it is not reflective of the biological reality of the children's situation.[10] The consequences

7 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [80] and [96]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [75].

8 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [97]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [76].

9 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [98]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [77].

10 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [100]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [79].

of this serious restriction on identity in this respect meant the Court found France had exceeded its margin of appreciation.

Overall regarding the right to respect for private life, the lack of filial connection established under French law and the bearing this had on the substance of the children's identity (and therefore their right to preserve their identity under Article 8 of the Convention on the Rights of the Child[11]) left them in a position incompatible with their best interests, which the Court stated must guide any decision concerning them (as per Article 3 of the CRC, which establishes the 'Best Interests' principle[12]).[13] The Court, in balancing the interests at stake, found the balance reached by the State was incorrect, as it did not uphold the best interests of the children satisfactorily.

6 Children's rights to the fore

Although the judgments of the European Court of Human Rights in *Mennesson* and *Labassee* can be read as continuing the potentially concerning trend in the international commercial surrogacy context of law-making through judicial intervention – which is already happening in some domestic jurisdictions – the judgments should first and foremost be understood in large part as a 'win' for children's rights. Whilst the Court did not engage (and indeed, did not need to in order to rule on the matters at hand) in any issues related to the wider ethics and legality of the practice of ICS (for example, commodification and sale of children; the potential for child trafficking; coercion and exploitation of women acting as surrogates; reproductive rights, autonomy and health of women; issues of global injustice between more and less-developed states), it reached its decision with the rights of the child top-of-mind. In adopting an unambiguous, child-centred approach in its judgments in both *Mennesson* and *Labassee*, the Court's Chamber has planted a stake in the ground; in matters of ICS, the rights of the child should be a central concern for all those involved in making decisions pertaining to children born through such arrangements.

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11 UNTS vol. 1577, p.3, entry into force September 2, 1990. Article 8(1) establishes that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

12 UNTS vol. 1577, p.3, entry into force September 2, 1990. Article 3(1) establishes that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Adherence to the best interests of the child is one of the four general or guiding principles of the CRC (which form general requirements for all rights under the CRC), the others being non-discrimination (Article 2), the child's right to life, survival and development (Article 6), and respect for the views of the child (Article 12). See U.N. Doc. CRC/C/58 at section III, pp.9-13 (1996).

13 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 at [99]-[101]; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 at [79]-[80].

The strength of the judgments lies in the fact that the Court examined the children's situations in relation to their commissioning parents with regard to what was in the children's best interests. By necessity, this required the Court to take a view of the children's situation grounded in practical reality; the Court did not shy away from this. It is important to remember that the Mennesson and Labassee children had been living with their commissioning parents since birth, for well over a decade; they are the genetic children of their commissioning fathers (who are, therefore, both their social and genetic parents). Significantly, the central thrust of the Court's reasoning, focussing on the substantive right to identity, points towards an urgent need for greater efforts by all those involved in dealing with ICS situations to give effect to Article 8 of the CRC (protecting the child's right to preserve their identity), and by extension, Article 7 of the CRC (protecting birth registration, nationality and filiation).[14]

Moreover, the emphasis the Court placed on the importance of establishing filiation in these ICS cases highlights the criticality of the child-parent nexus to identity formation, and its role in fulfilling the right to respect for private life. Had the children and parents involved in these applications not been able to live together as a family unit in France, it seems very likely the Court may well have been open to finding a violation of the right to respect for family life too (and this may well have extended to a finding of a violation regarding not only the children, but their parents as well).

Despite the European Court of Human Rights' strong focus on the right to identity in deciding these cases – and indeed, the importance it placed on the existence of a biological link between the children and their commissioning fathers – it is a shame the Court did not make any mention (in obiter dicta or otherwise) of the full picture concerning their genetic and biological makeup. Although not necessary to decide the applications, the judgments would have been strengthened through the Court at least observing that the children's genetic relationship with their genetic mothers (oocyte donors), and biological relationship with the women who carried them to term and gave birth to them (through acting as their surrogate mothers), forms another significant aspect of their identity, and one which steps should be taken to protect and preserve knowledge of. Judicial discussion by the Court of this aspect of identity would have highlighted this reality, relevant for all children born through ICS. Furthermore it would have led to a more holistic approach in considering the rights of the child in cases such as these, and extended understanding of what is required in order to fully uphold a child's best interests in ICS situations, consistent with their rights under the CRC.

14 UNTS vol. 1577, p.3, entry into force September 2, 1990. Article 7(1) provides that "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

In the future, the Court may well be confronted with a factual scenario requiring it to confront the broader human rights issues at play in international commercial surrogacy situations, including the intersection of the rights and interests of the various parties involved in such situations. The Court should be applauded placing such strong emphasis on children's rights in its judgments in the *Mennesson* and *Labassee* matters. In doing so, it has brought sharp focus to the reality of ICS that it is a phenomenon driven towards producing a child, that the child is the person at the centre of such arrangements and yet often it is the child's rights which are least considered and protected in the course of their conception, birth and life thereafter. However, in future the Court may have to deal more explicitly with the rights of the other parties involved in international commercial surrogacy arrangements, or at least consider them. Although the most likely other parties in international commercial surrogacy situations whose rights the Court will need to examine more closely are the commissioning parents, the rights of gamete donors (and therefore genetic parents) and of surrogate mothers are likely to also be of relevance and importance. This will present the Court with a complex web of rights issues to untangle, requiring a delicate balancing assessment on the basis of specific circumstances.

For example, regarding the rights of women in international commercial surrogacy, these intersect at a number of points with the rights of the child and may well present a clash of rights.[15] Women acting as surrogates in ICS may not do so of their own free will, and may be pressured or in extreme cases coerced into ceding their reproductive autonomy. Such situations can involve the commissioning parents of the surrogate herself wishing to abort the foetus, bringing the surrogate woman's rights into conflict with the commissioning parent's interests or in direct conflict with the rights of the future child. Moreover, as in a traditional domestic surrogacy situation, the actions of the surrogate in ICS during the pregnancy (in particular regarding personal health and lifestyle decisions) may have a bearing on the health and development of the future child, again bringing rights into potential conflict.

Finally in terms of women's rights in relation to the rights of the child born through ICS, as much as the child has a right to preserve their identity and therefore know the identity of their birth mother, it is arguable that the surrogate woman herself has a claim to know the child she carries to term and births, despite the intention and understanding that she will provide that child to the commissioning parent(s) upon birth. From a genetic identity perspective, this may also be the case for women who act as oocyte donors in ICS, and are therefore the genetic mothers of international surrogate children. Here, the realisation of the child's identity rights is intimately linked to and will in part

15 The preamble of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, UNTS vol. 1249, p.13, entry into force September 3, 1981 recognises that "the role of women in procreation should not be a basis for discrimination".

be reliant on the decisions made by donor mothers as to whether they are willing to be known to their genetic offspring. In this connection, it will be interesting to see whether the European Court of Human Rights is presented in future with the opportunity to not only extend its jurisprudence relating to ICS, but also its wider body of decisions relating to reproductive rights and assisted human reproduction under Article 8 of the ECHR, and the right to become or not become a parent, as well as the significance of the genetic parent-child relationship.[16] Indeed, there is certainly potential for these issues to dovetail in applications involving children born to European commissioning parents through ICS arrangements involving European surrogate mothers and/or oocyte donors.[17]

7 French Government reaction and future implications of the *Mennesson* and *Labassee* judgments for human rights in the context of international commercial surrogacy

Following publication of the judgments, the French Minister for Families announced France will not appeal the Court's decisions, meaning the decisions will be incorporated into French law, and children born outside of France to French commissioning parents through surrogacy will be recognised as French citizens. Furthermore, the judgments have now become final, given that no request was received by the Court for referral of the judgments to the Grand Chamber within the request for referral period following the Chamber's judgments.[18] The immediate impact of the judgments will not be restricted

16 Within the Court's pre-existing body of jurisprudence in this respect, see for example *Evans v. United Kingdom* (2008) 46 E.H.R.R. 34; *Dickson v. United Kingdom* (2008) 46 E.H.R.R. 41; *SH and others v. Austria* (App. No.57813/00), judgment of November 03, 2011 [GC]; *Costa and Pavan v. Italy* (App. No.54270/10), judgment of August 28, 2012; *Knecht v. Romania* (App. No.10048/10), judgment of October 02, 2012; and the pending application *Nedescu v. Romania* (App. No.70035/10).

17 In fact, the pending application of *Paradiso and Campanelli v. Italy* (App. No. 25358/12) may provide such an opportunity, given the matter involves Italian commissioning parents and a surrogate mother in Russia (the nationality of both the genetic mother and father remain unclear on the facts before to the Court to date).

18 Article 43-44 Convention for the Protection of Human Rights and Fundamental Freedoms (1950; CETS No.005; ECHR). Article 43(1) states that "Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber." Article 44(2)(b) states that the judgment of a Chamber shall become final "three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested". The ECHR Press Unit confirmed to the author of this Case Analysis (via email on October 01, 2014) that *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014 and *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014 became final on 26 September, 2014, as no requests for referral to the Grand Chamber were received by the Court regarding either judgment.

to the three children in the *Mennesson* and *Labassee* cases; one estimate says children in similar situations born as a result of French parents undertaking international surrogacy now number some 2000.[19] Extrapolating out to wider Europe, the impact is potentially much greater, given the expectation on other Council of Europe members to adhere to the Court's judgments (erga omnes character of judgments), consistent with the principle of subsidiarity underlying the Court. Other members upholding the res interpretata effect of the Court's decisions in regard to the Court's decisions in *Mennesson* and *Labassee* may at least prevent a future stream of international surrogacy situations relating to filiation from clogging the Court's docket.

In terms of the future implications of these decisions, it will be interesting to see what approach the Court will take in an application concerning children born through ICS with no biological link to either of their commissioning parents. Such a factual scenario is currently pending before the Court in the application of *Paradiso and Campanelli v. Italy* (App. No. 25358/12). The application presents an extremely complex ICS situation involving a child born to Italian commissioning parents and a surrogate mother in Russia; DNA tests show neither of the commissioning parents are genetically related to the child, despite the commissioning parents intending there would be a genetic link between the child and the commissioning father (therefore the child's genetic identity remains unknown). Pursuant to an Italian Court order, the child was removed from the commissioning parents and is residing in a child welfare institution; the applicants are prevented from having contact with the child. Their application is brought in reliance on Articles 6, 8, and 14 of the ECHR and Article 1 of Protocol No. 12 to the Convention. Notably however, in its *Mennesson* and *Labassee* judgments, whilst emphasising the importance of the genetic link between the children and the fathers, the Court did not explicitly state that the existence of a genetic link between a child and a commissioning parent is so critical that it must be present for filial recognition in law in ICS situations.

Whether this is an intentional door left open, or simply something the Chamber did not wrestle with in reaching its decision is hard to say. However, it appears that the Court will very likely have to deal with this issue explicitly in *Paradiso and Campanelli v. Italy*, given it is faced with a child who has no genetic link to its commissioning parents, and a claim by those commissioning parents that the refusal to recognise parentage under Italian law violates their and the child's Article 8 rights (in conjunction with other ECHR rights).[20] A

19 James Brooks, 'France to recognise children born via surrogates abroad', *BioNews* 761, July 07, 2014, available from http://www.bionews.org.uk/page_434635.asp [Accessed September 20, 2014).

20 Moreover, the Court may find itself in a situation where a finding of a violation of Article 8 in terms of right to respect for family life (as well as private life) is more likely, given that unlike in the *Mennesson* and *Labassee* situations, *Paradiso and Campanelli* concerns a child and commissioning parents who have been prevented from living together and from having

further difficult test for the Court would be the extent to which it would apply similar lines of reasoning to applications regarding potential future (conceived but as yet unborn, or simply planned) children commissioned through ICS, as distinct from already existing children who are born this way. Again, should applications come before the Court on the basis of such situations, opportunities may exist for the Strasbourg jurisprudence relating to ICS to grow, and to for its jurisprudence relating to wider issues of reproductive rights, the unborn child and the right to life to be extended.

More widely, the *Mennesson* and *Labassee* decisions are emblematic of the fact that the status of the child and legal parentage is in an evolutionary phase, due to the rise of ICS. Increasingly, the executive, legislative and judicial branches of government in countries around the world are being confronted with complex issues arising out of ICS situations. Some, such as Ireland, are currently grappling with these issues through both the Courts and the legislative development process.[21] The European Court of Human Rights, in reaching these decisions has highlighted the paramountcy of the best interests of the child in ICS situations. Helpfully, the Court has also provided clear direction as to what it views as essential to the substance of the child's right to identity, which will deepen understanding of this concept from a legal perspective. In this vein, the Court's judgments in *Mennesson* and *Labassee* are important given their role in clarifying the significance of the nexus between the child's right to identity and to nationality. Given that the spectre of statelessness is a reality for children born through ICS, the Court's emphasis on nationality as an element of identity underscores the obligation on states to ensure children are able to acquire a nationality, and are not rendered stateless in ICS situations.

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contact. However, the Court's determination regarding the significance of a genetic link could be the first crucial issue that the other subsequent issues raised in the application will then turn on.

21 The Children and Family Relationships Bill 2014 is a landmark piece of draft legislation setting out fundamental reforms to Irish family law, including provisions relating to international commercial surrogacy and children conceived and born through assisted reproductive technology. At the time of time of writing this Case Analysis, the Bill is under consideration by the Irish Government. The Irish Ombudsman for Children published Advice on the General Scheme of the Children and Family Relationships Bill 2014 in May 2014. Among other things, the Ombudsman emphasised the need for clear laws on international commercial and altruistic surrogacy consistent with the best interests of the child, as well as the importance of the child's right to preserve their identity when born through international surrogacy or via assisted reproductive technology. The Ombudsman's advice is available from http://www.oco.ie/wp-content/uploads/2014/06/OCOAdviceonChildandFamilyRelBill2014.pdf [Accessed September 20, 2014). The Irish Courts have been actively dealing with cases of both domestic and international surrogacy over recent years; a landmark appeal is pending before the Supreme Court of Ireland which may have significant implications for parties to surrogacy arrangements with a connection to Ireland (case on appeal: *M.R & Anor -v- An tArd Chlaraitheoir & Ors* [2013] IEHC 91, judgment of Abbott J. of March 05, 2013).

Outside Europe, the Court's judgments in *Mennesson* and *Labassee* should be of interest to all States which find themselves on the demand or supply-side of ICS as it continues to grow internationally. Given the recent supply-side growth of the ICS market in Asian countries (and the demand flowing from within the Asia-Pacific region as well as from Europe and North America), human rights issues in ICS are likely to continue to come before national courts in the Asia-Pacific region for adjudication.[22] Given the lack of a regional human rights court in this region of the world, the judgments of the European Court of Human Rights on this subject may therefore play an important role in national judicial determination of ICS cases, based on their persuasive value. The judgments will also be of particular interest to the Members of the Hague Conference on Private International Law, as its Permanent Bureau continues work at the request of its Members into the viability of a private international law convention addressing child status and parentage in international surrogacy situations.[23] Perhaps, however, it is the audience that the judgments are least likely to reach, namely prospective commissioning parents around the world, who the Court's findings could have the most important impact on. The legal limbo and associated consequences experienced by the Mennesson and Labassee children is surely a cautionary example of the potential risks involved in international commercial surrogacy arrangements. One would hope it is a clarion call for prospective commissioning parents to rigorously consider the likely impact on their potential future children, before taking a leap into this brave new world of human reproduction to create them.

22 Indeed, among others, the recent case of Baby Gammy, born to Australian commissioning parents and a Thai surrogate mother in Thailand is illustrative of the human and children's rights issues being raised in the Asia-Pacific region through international commercial surrogacy. The case received international media attention in August/September 2014 due to the fact that Baby Gammy, born with Down syndrome, was left in Thailand with his surrogate mother whilst his twin sister was taken to Australia by the twin's commissioning parents. The commissioning father's past child abuse convictions came to light as a result of media attention and an investigation was launched by Australian child welfare authorities into the welfare of the baby girl. The Thai government reacted with plans to outlaw international commercial surrogacy in Thailand.

23 This work is being dealt with as a project entitled "The private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements". See for further information http://www.hcch.net/index_en.php?act=text.display&tid=178 [Accessed September 20, 2014].

ADDENDUM TO CHAPTER 9:

BRIEF CASE COMMENTARY – *PARADISO AND CAMPANELLI V. ITALY*, GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. Introduction

Chapter 9 of this doctoral thesis presented a case analysis of the first European Court of Human Rights (ECtHR) judgments concerning ICS, both issued by the Chamber of the Court's Fifth Section. However, in January 2017, the Grand Chamber of the ECtHR issued its first ICS judgment, in the case of *Paradiso and Campanelli v. Italy*.[24] Given the landmark nature of this judgment, this Addendum to Chapter 9 is included as part of the present doctoral thesis, to provide an overview of the Grand Chamber's decision and a short analysis of the case from a child rights perspective.

2. The circumstances of the case

The circumstances of the case are complex and are comprehensively outlined by the Grand Chamber in Section I of its judgment.[25] To summarise the most pertinent facts, after being approved to adopt a child in Italy but not having been offered a child to adopt,[26] the applicants had commissioned a child through ICS via a clinic in Russia. The male applicant's sperm was provided to create the embryos which were implanted into the surrogate for the purposes of the surrogacy,[27] and the use of his sperm was certified by the surrogacy clinic.[28] The surrogate gave birth to a child on 10 March 2011 and provided her written consent to the child being registered as the applicants' child.[29] The child was registered in Russia and a Russian birth certificate was issued, listing the applicants as the child's parents.[30] In the days following the child's birth, the female applicant and the child moved to live together in a rented flat in Moscow (she had travelled to Moscow, however, the male applicant had remained in Italy).[31]

The female applicant and the child travelled to Italy (arriving on 30 April 2011)[32] after having obtained documentation from the Italian Consulate in Moscow allowing her to travel to Italy with the child.[33] Subsequently, criminal proceedings were initiated by the Italian authorities against the applicants, on the grounds that by bringing the child to Italy they had acted in violation of the Italian Criminal Code

24 *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment (Grand Chamber), 24 January 2017.
25 *Ibid*, at [8]-[56].
26 *Ibid*, at [9]-[10].
27 *Ibid*, at [11].
28 *Ibid*, at [12].
29 *Ibid*, at [14].
30 *Ibid*, at [16].
31 *Ibid*, at [15].
32 *Ibid*, at [18].
33 *Ibid*, at [17].

and the Adoption Act.[34] Concurrently, proceedings were initiated by the Public Prosecutor to have the child made available for adoption because he was determined to be in a state of abandonment under the law; a *guardian ad litem* was appointed for the child.[35]

The applicants challenged the authorities' measures to place the child under guardianship;[36] the Italian authorities' social workers reported the applicants were caring for the child to the highest standards.[37] DNA testing of the child and male applicant revealed that no genetic link existed between them,[38] and the applicants' request to register the particulars of the child's birth certificate in the Italian civil status register was refused.[39]

The Campobasso Minors Court subsequently ordered the child be removed from the applicants' care and be taken into social services' care and placed in a children's home;[40] the applicants said the decision was enforced the same day as the order was made, without advance notice.[41] At the time of his removal, the child had been in the applicants' care for approximately eight months.[42] The applicants appealed this decision; the Campobasso Appeal Court dismissed their appeal, finding the child was in a state of abandonment given the applicants were not his parents.[43] Ultimately, the child never returned to the care of the applicants; he lived in a children's home for approximately 15 months and all contact between the child and the applicants was prohibited.[44] Later he was formally adopted into another family.[45]

3. *The central issues before the Grand Chamber*

As previously noted in Chapter Eight of this doctoral thesis, the Chamber of the ECtHR held in its 2015 judgment in the case[46] that *de facto* family life existed between the applicants and the child under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[47] and that there had been an interference with the applicants' *de facto* family life[48] and the male applicant's private life.[49] The Chamber further held that the interference amounted to a violation

34 *Ibid*, at [21].
35 *Ibid*, at [22].
36 *Ibid*, at [23]-[33].
37 *Ibid*, at [25].
38 *Ibid*, at [30].
39 *Ibid*, at [32].
40 *Ibid*, at [36]-[37].
41 *Ibid*, at [38].
42 *Ibid*, at [152].
43 *Ibid*, at [40].
44 *Ibid*, at [49].
45 *Ibid*, at [50]-[55].
46 *Paradiso and Campanelli v. Italy*, Application No 25358/12, Merits and Just Satisfaction, 27 January 2015.
47 Convention for the Protection of Human Rights and Fundamental Freedoms (1950; CETS No.005; ECHR).
48 *Supra* n.23, at [67]-[69].
49 *Ibid*, at [70].

of Article 8, because by removing the child, the authorities had not struck an appropriate balance between the interests at stake.[50] However, due to the child having developed an attachment with his foster family, the Chamber ruled the State was not obliged to return the child to the applicants.[51]

At appeal, the central issues before the Grand Chamber were a) the applicability of Article 8 to the case; b) whether the measures taken by the Italian authorities resulting in the child's removal amounted to an interference with the applicants' Article 8 rights; and c) whether those measures were taken consistently with Article 8(2) of the ECHR.

N.B. In its judgment in *Paradiso*, the Grand Chamber for the most part distinguishes its judgments in *Mennesson v. France* and *Labassee v. France*. It does so largely on the basis that in those cases, a genetic link existed between the children involved and at least one of their commissioning parents.[52] Furthermore, in *Paradiso*, the child was not an applicant before the Court.[53]

4. The main findings of the Grand Chamber

a) Applicability of Article 8

The Grand Chamber overturned the Chamber's view regarding family life, holding that no family life had existed between the applicants and the child – it said the child was not and had never been a member of the applicants' family.[54] The reasons the Grand Chamber gave for its conclusion that no family life existed between the applicants and the child were: because a genetic link did not exist between the child and the applicants; the length of time of their relationship with the child (eight months) was viewed as being short; and the fact of the lack of legal basis to their relationship with the child. The Grand Chamber reached this view regarding family life despite acknowledging the quality of the emotional bond between the applicants and the child, and the applicants' demonstrated 'parental project'.[55]

b) Interference with the applicants' Article 8 rights

However, the Grand Chamber said that the applicants were affected by the judicial decisions which led to the child's removal into social services' care with a view to adoption. The Grand Chamber found that the removal of the child, his placement in a children's home without any contact with the applicants, and his subsequent placement under guardianship with a view to his adoption amounted to an interference with the applicants' Article 8 right to respect for their private life.[56]

50 *Ibid*, at [75]-[87].
51 *Ibid*, at [88].
52 *Supra* n.1, at [133]; [195].
53 *Ibid,* at [135]; [195].
54 *Ibid,* at [157]-158].
55 *Ibid,* at [151].
56 *Ibid,* at [166].

c) Measures consistent with Article 8(2) of the ECHR

The Grand Chamber (by a majority of eleven to six) held that the Italian authorities had acted consistently with Article 8(2) of the ECHR, and therefore, there was no violation of Article 8.[57] The Grand Chamber said that the measures taken culminating in the child's removal from the applicants had been in accordance with law and in pursuance of a legitimate aim (preventing disorder; to protect the rights and freedoms of others; the State had exclusive competence to recognise parent-child relationships in order to protect children).[58] Regarding proportionality, the Grand Chamber found the Italian Courts had struck a fair balance between the public and private interests at stake.[59]

The Grand Chamber emphasised that the child was not an applicant in the appeal but that "[T]his does not mean however, that the child's best interests and the way in which these were addressed by the domestic courts are of no relevance."[60] (The Court went on to cite Article 3 of the United Nations Convention on the Rights of the Child). However, the Grand Chamber observed that "the Court does not consider in the present case that the domestic courts were obliged to give priority to the preservation of the relationship between the applicants and the child. Rather, they had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli*, or taking measures with a view to providing the child with a family in accordance with the legislation on adoption."[61] The Grand Chamber said the Italian Courts had appropriately considered the best interests of the child and found that his removal from the applicants' care would not cause him grave or irreparable harm.[62] The Grand Chamber also emphasised the illegality of the applicants' actions and that their relationship with the child was always precarious from the time they brought him to Italy to live with them, and that the negative DNA test results had rendered the relationship even more tenuous.[63]

5. Analysing the Grand Chamber judgment from a child rights perspective

The Grand Chamber's judgment in *Paradiso and Campanelli v. Italy* is problematic from a child rights perspective in a number of respects, which are relevant to outline given the context of this doctoral thesis.

a) The (non)existence of family life

The Grand Chamber's view that the child was not a member of the applicants' family and that no family life existed between the child and the applicants takes an overly restrictive view of what constitutes family life. The Court does not seem to attach any weight to the fact that had it not been for the applicants, the child would not

57 *Ibid*, at [215]-[216].
58 *Ibid*, at [168]-[174]; and [175]-[178].
59 *Ibid*, at [200]ff.
60 *Ibid*, at [208].
61 *Ibid*, at [209].
62 *Ibid*, at [210].
63 *Ibid*, at [211].

exist. This fact remains, regardless that due to a clinical error, their intention to have a child through ICS with a genetic link to the male applicant was not borne out in practice. On the facts available, only the applicants had cared for the child (or indicated any interest in caring for the child) from the time he was born until the time he was removed from their care; therefore, no one but the applicants can be said to have parented the child during that period.

The first year of life is a formative time for a child, during which children form attachment(s) to persons caring for them, and these attachments can be important throughout childhood and into adulthood. Based on the Italian authorities' social worker's report, evidence existed that such attachments had and were continuing to form between the child and the applicants, and that his welfare needs were being met through the care and family environment provided by the applicants. Moreover, the child had been in the applicants' care for eight months, which amounted to most of his life; in terms of a baby's life, this was tantamount to a lifetime.

b) The best interests of the individual child

In its statement of the international law relevant in the case,[64] the Grand Chamber provides a sound overview of the relevant provisions of the CRC, including the best interests of the child principle, and also cites relevant provisions of the Committee on the Rights of the Child's General Comment No. 7 on implementing child rights in early childhood.

The Grand Chamber only limitedly follows through on these provisions relating to the child's rights and best interests in its decision in *Paradiso.* Because of the view taken by the Grand Chamber concerning family life (N.B. the dissenting judges took the view that family life did exist between the applicants and the child[65]), the *Paradiso* judgment is problematic from the outset from a child rights perspective. In its judgment, the Grand Chamber provides relatively little reasoning that seeks to apply the relevant provisions of the CRC and the best interests of the child principle. This stems from the Grand Chamber's view that because it found family life did not exist between the applicants and the child, its role was not to examine the case from the perspective of preserving a family unit, "but rather from the angle of the applicants' right to respect for their private life, bearing in mind that what was at stake was their right to personal development through their relationship with the child."[66] On this basis, with respect to the child's best interests, the Grand Chamber was, therefore, satisfied that the Italian courts had based their decisions on relevant reasons that served to protect the individual child in the case and children in general.[67] The Grand Chamber also held the view that these reasons were sufficient, given their focus on the illegality of the situation created through the actions taken by the applicants, and the child's situation as a result.[68]

64 *Ibid,* at [76]-[77].
65 Joint dissenting judgment of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev, at [2]-[5].
66 *Supra* n.1, at [198].
67 *Ibid,* at [196]-[197].
68 *Ibid,* at [198]-[199].

Similarly, the Grand Chamber did consider the child's best interests in is reasoning concerning proportionality in *Paradiso*, but placed greater weight on the general interests of children rather than the best interests of the individual child involved in the case at hand. Again, this owed to the fact the Grand Chamber was considering the matter in the context of the right to respect for private life, not family life, and only that of the applicants (not the child). However, in relation to the individual child's best interests, the Grand Chamber was satisfied with the domestic courts consideration of the child's best interests,[69] and in particular attached importance to the fact that the court which had made the determination that the child's removal from the applicants' care would not cause him grave or irreparable harm was a specialised Minors Court.[70] Given its view of the domestic courts' treatment of the child's best interests, and the significant weight attached to the public interests the impugned measures were seeking to protect, the Grand Chamber found the actions taken in interference with the applicants' right to respect for their private life were proportionate within the States' margin of appreciation.

From a child rights perspective, the alternative provision of care for the child imposed by the State in the *Paradiso* case – namely removal of the child and placement into State care – was arguably a disproportionate measure for the State to take in the case of this one particular child. Disproportionate, because of the evidence before the domestic Courts reflecting that the child was being well-cared for; the applicants clearly wanted to continue caring for the child and provide him with a family environment, (and had been assessed by the Italian authorities' social workers as providing such an environment);[71] and in light of these facts, placing the child into the uncertainty of the State care system should not have been the State's action of first resort.[72] Rather, a more proportionate course of action would have been to impose measures

69 See [202]ff.

70 *Ibid,* at [212].

71 It is unclear to what extent relevant developmental brain science research informed the view that the child would not suffer grave or irreparable harm as a result of his separation and removal from the applicants' care; it is now understood as a result of scientific research that "[a]ttachment patterns develop over the first few years of life and can influence mental health and psychological functioning throughout childhood and the adult years (See: Center on the Developing Child at Harvard University, *The Foundations of Lifelong Health are Built in Early Childhood,* 2010, p.8); and that early childhood development is in part fuelled by reciprocal 'serve and return' interaction between children and the adults who care for them, and that taking this away can have detrimental impacts on the child's developing brain, as well as later in life. (See: Center on the Developing Child at Harvard University, *Applying the Science of Child Development in Child Welfare Systems,* 2016, p.5). Given the young age of the child at the time of his removal from the applicants' care, it would have been of great importance to consider these kinds of factors, which are grounded in developmental brain science.

72 Indeed, it is generally recognised that family care settings are to be preferred to institutional care settings; N.B. Part II, A[3] UN Guidelines for the Alternative Care of Children: "The family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members." Resolution adopted by the General Assembly, [on the report of the Third Committee (A/64/434)] 64/142, 24 February 2010.

to monitor the welfare and care of the child over a reasonable period of time through regular visits and reporting by State social workers, to build up a broader picture of the child's situation in the care of the applicants. This would have more comprehensively enabled future steps regarding the child's care situation to be informed and made in a well-reasoned and proportionate manner. This would have been preferable from a child rights perspective, rather than the State prematurely taking what amounted to an extreme action, arguably affecting both the child and the applicants.

However, the Grand Chamber, by stating in its judgment that "[A]ny measure prolonging the child's stay with the applicants, such as placing him in their temporary care, would have carried the risk that the mere passage of time would have determined the outcome of the case"[73] does not seem to give satisfactory consideration to the alternatives which could have been employed by the Italian authorities, while still enabling the intent and spirit of the relevant domestic laws to be upheld. Indeed, the Grand Chamber was right to emphasise that the laws that the applicants contravened existed to protect "very weighty public interests."[74] However, the measures taken by the Italian authorities did not appear to attach enough weight to the evidence before them about the individual child's situation. Based on the information before them, the child was safe and well-cared for, in the care of adults who – had it not been for the mistake of the Russian surrogacy clinic – would have shared one genetic link with the child. Furthermore, it was not the child's fault that the applicants had acted in contravention of Italian law by commissioning his conception and birth through ICS in a foreign jurisdiction; the Grand Chamber did not appear to consider this point in its reasoning.

Yet by declaring the child to be in a state of abandonment and removing him from the applicants' care without any further contact, the child's first eight months of life were essentially wiped out of existence. This raises fundamental questions regarding the child's right to identity preservation under Article 8 of the CRC, and Article 7 CRC concerning his right to, as far as possible, know and be cared for by his parents. Although the question of who can be said to be the child's parents in this particular case is fraught, arguably the applicants were the only people who could be said to be his parents at the time of his removal into State care. It is worth noting here that in its General Comment No. 14 on the best interests of the child, the Committee on the Rights of the Child states that in decisions concerning the best interests of an individual child, that child's interests should not be understood as being the same as the interests of children in general, but rather the particular child's best interests must be individually assessed.[75] This indicates that when a child's situation is before a decision-making body, that body should give due consideration to the child's best interests in light of the child's individual circumstances in which the decision-making body finds him or her.

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73 *Supra* n.1, at [213].

74 *Ibid,* at [204].

75 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, CRC/C/GC/14, 2013, at [24].

Because the best interests principle is one of the guiding principles of the CRC, it thereby necessitates a holistic consideration of the child's CRC rights. The CRC Committee elaborates that "[F]or individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child."[76] It is difficult to see, based on the facts of the case, how the protection of the best interests of children in general outweighed the best interests of the individual child concerned, on the basis of the evidence available. Indeed, the dissenting judgment in *Paradiso* argues – based on the Grand Chamber's judgments in *Neulinger and Shuruk v. Switzerland*[77] and *R. and H. v. the United Kingdom*[78] – that two considerations are crucial in identifying what is in the child's best interests in a particular case: namely that it is in the child's best interests that his or her family ties are maintained, except in cases where the family has proved particularly unfit; and it is in the child's best interests to ensure his or her development in a safe and secure environment.[79] However, due to the majority judgment in *Paradiso* that no family life existed, these factors appear to have been not considered relevant by the Grand Chamber majority judges.

c) Treatment of competing interests at stake

While the Grand Chamber judgment certainly raises valid concerns regarding the importance of upholding the general public interest, arguably the Grand Chamber attached too much weight to these considerations, leading it to gloss over the importance of considering the best interests of the individual child in a more holistic manner. However, this is connected to the view the Grand Chamber took at the outset, namely that no family life existed in this case, and also the fact that the child was not an applicant before the Court in this case. Based on the Grand Chamber's decision in *Paradiso,* it will be interesting to see how the ECtHR continues to navigate the terrain of balancing children's rights at the general public interests level and the individual level in future jurisprudence. Especially in future cases where the facts occur in the context of ICS, and given the lack of consensus among the High Contracting Parties to the ECHR on surrogacy as a practice, jurisprudence of the ECtHR in this area is likely to remain a significant source of interest for child rights legal scholars, among others.[80]

6. Concluding remarks

CRC States Parties have an obligation to ensure that decisions concerning individual children consider comprehensively their particular circumstances and what would

76 *Ibid,* at [32].
77 Application no. 41615/07, Judgment (Grand Chamber), 06 July 2010, at [136].
78 Application no. 35348/06, Judgment (Court, Fourth Section, 31 May 2011, at [73]-[74].
79 *Supra* n. 42, at [6].
80 N.B. The Grand Chamber's judgment in *Paradiso* has already been the subject of some legal commentary and analysis, see e.g. A.G. Barnett, '*Paradiso and Campanelli v. Italy*: Application no 25358/12: European Court of Human Rights', *Oxford Journal of Law and Religion*, vol.6:2 (2017) 412–413; and L. Bracken, 'Assessing the best interests of the child in cases of cross-border surrogacy: inconsistency in the Strasbourg approach?', *Journal of Social Welfare and Family Law*, vol.39:3 (2017) 368-379.

serve the child best in light of those circumstances. This remains the case regardless of the individual States Party's position, taken within its margin of appreciation (in the European context) regarding sensitive ethical issues such as surrogacy as a method of family formation. The fact remains that children are continuing to be born through ICS. This will mean that courts and other competent authorities will continue to be confronted with situations where individual children have formed an attachment with those persons who have been responsible for them coming into existence, and in whose care they have lived for differing lengths of time and with whom they have formed a *de facto* family life.

In cases where the individual child has been born through situations contrary to applicable domestic laws, once that individual child's situation is before a court or competent authority, the child's individual best interests should be the primary consideration. If remaining in the care of their commissioning parents (despite those persons' illegal action) is found to be in the child's individual best interests, that child's best interests should outweigh any competing interests (such as the general public interest). Of course, this is not to say that individual States should not remain free to establish their own legislation and policies which take a more or less restrictive position on surrogacy and other sensitive ethical matters; but rather, to say that when an individual child is involved, that individual child's best interests must be accorded appropriate consideration to inform decision-making affecting him or her.

10 Multiple Potential Parents But a Child Always at the Centre

Balancing the Rights and Interests of the Parties to International Commercial Surrogacy Arrangements

Abstract

As has been demonstrated throughout the preceding chapters of this study, due to the nature of ICS, this method of family formation often brings the rights and interests of the child into conflict with those of the other core parties to ICS arrangements. As a result, rights need to be balanced against each other in the ICS context, to establish the balance to be struck amongst competing rights and interests. This Chapter hones in on the balancing of rights and interests of the child with those of other core parties to ICS: surrogate mothers, genetic donor parents and commissioning parents in ICS. This Chapter argues that rights balancing exercises will be necessary in relation to these core parties throughout the course of ICS arrangements, and that the child's rights and best interests must be accorded priority once born, given their particular stage in life and their vulnerability in comparison to the other core parties. In keeping with the preceding chapters in this study, while recognising the indivisible, interdependent and interrelated nature of children's rights, this Chapter draws attention to the child's rights most at risk in ICS, focusing on the need to respect the best interests of the child in all ICS situations. It proposes that along with this approach, the principle of human dignity must guide rights balancing in ICS, to strike an overall balance between the child's rights and best interests and the rights and interests of other core parties where necessary.

Main Findings

- ICS is a method of family formation bringing the rights and interests of children born through ICS into conflict with other core parties to ICS, namely surrogate mothers, genetic donor parents and commissioning parents. The rights and interests of surrogate mothers and commissioning parents can also clash. Therefore, rights balancing exercises are necessary throughout ICS arrangements.
- In balancing competing rights and interests between unborn children and surrogate mothers in ICS, the surrogate mother's rights and interests will likely outweigh those of the child she carries. This is especially so when the surrogate mother's health or life are at risk during pregnancy.

- In ICS, protecting and giving effect to the child's identity preservation and health rights and best interests should outweigh genetic donor parents' rights to privacy.
- A right to be a parent does not exist under international human rights law. In balancing the rights and interests of children born through ICS with those of their commissioning parents, the child's rights and best interests should be treated as paramount.
- In balancing the rights and interests of surrogate mothers and commissioning parents, in the prenatal stage of ICS arrangements, the surrogate mother's rights to reproductive autonomy, health and survival will likely outweigh the commissioning parents interests; however, once a child is born in ICS, the child's best interests should be paramount in the balancing of rights and interests.
- Overall, the concept of human dignity should guide all actions and decisions in ICS. However, once a child is born in ICS, their rights and best interests should be accorded most weight in the balancing of rights.

Contextual notes

- Little scholarly work exists on rights balancing in the ICS context; this Chapter is relevant to judicial decision-makers, executive government decision-makers, legislators and policy-makers.
- This Chapter will remain relevant as long as ICS continues to be practiced, and in particular in the absence of any international regulation governing ICS or any international consensus on ICS.

1 Introduction

An alternative method of family formation in the 21st Century, international commercial surrogacy (ICS) raises profound questions relating to the balancing of competing human rights, given the involvement of multiple parties with rights and interests at stake. By their nature, ICS arrangements always involve multiple potential 'parents', but most significantly from a child rights perspective, there is always a child (or children, when multiple births occur) at the centre. After all, ICS arrangements are founded on the common intention of commissioning parents to create a child with the involvement of a surrogate in a different state from that which commissioning parents themselves reside in.[1]

1 For a discussion of the drivers of ICS and the parties involved in ICS, see C. Achmad, 'Understanding international commercial surrogacy and the parties whose rights and interests are at stake in the public international law context', *New Zealand Family Law Journal*, (2012) 7:7, 190-198.

Given their conception and birth through ICS, the child is inherently vulnerable to potential violations of their rights under the United Nations Convention on the Rights of the Child (CRC)[2] which can be triggered before and after birth.[3] The child's rights in ICS can also conflict with the rights and interests of other core parties to ICS. As Gerards notes, "the dilemma of deciding 'hard cases' has become even more relevant in recent decades – the growing importance of fundamental rights and the increasing complexity and 'multi-levelness' of modern legal orders has resulted in ever greater numbers of 'hard cases' to be brought before the courts."[4] Certainly, ICS cases can and should be understood as 'hard cases', in large part due to the complexity of the conflicting rights and interests involved. This conflict presents a challenge to protecting children's rights and a practical challenge for decision-makers dealing with ICS on a case-by-case basis (such as judges and government ministers) in the absence of international agreement on or regulation of ICS; for policy-framers developing national approaches to ICS; and for actors at the international level devising long-term or best-practice international approaches to ICS.[5]

1.1 Focus and scope of this paper

This paper focuses on the core parties to ICS (the child; surrogate mother; commissioning parents) and considers how the competing rights and interests of children conceived and born through ICS arrangements, women acting as surrogates, genetic donor parents and commissioning parents can be balanced and weighed against each other. As Bainham notes, "It now seems clear that both children and parents possess rights and that the task for any legal system is to achieve a proper balance between them."[6] However, rights balancing is not a precise art; it is an area of human rights law and practice lacking comprehensive tools assisting with and applying to weighing competing rights and interests in situations such as ICS. Although the author's body of work

2 1989 United Nations Convention on the Rights of the Child, 1577 UNTS 3.

3 For discussion of the ways in which challenges to the child's rights can be triggered pre-birth and pre-conception, see: C. Achmad, 'Unconceived, Unborn, Uncertain: Is Pre-birth Protection Necessary in International Commercial Surrogacy for Children to Exercise and Enjoy Their Rights Post-birth?', (2016) submitted for publication to *International Journal of Children's Rights*; appearing as Chapter 6 of this doctoral thesis.

4 J.H. Gerards, ''Hard cases' in the law', in A. in 't Groen, H. Jan de Jonge and E. Klasen et al (eds.), *Knowledge in Ferment: Dilemmas in Science, Scholarship and Society* (2007), 121 at 123.

5 E.g. the Expert Group appointed by the Hague Conference on Private International law appointed to explore solutions to the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements, and the Expert Group appointed by the International Social Service preparing principles for protecting children in international surrogacy.

6 A. Bainham, *Children: The Modern Law* (3rd ed.), (2005), at 123.

does not focus on research specifically concerning rights balancing in ICS (this is a topic deserving of a doctoral study of its own), it is an important issue to be highlighted as a component of the author's doctoral thesis concerning the child's rights in ICS. Therefore, this paper is not a comprehensive study of rights balancing in ICS, but instead aims to introduce the concept of rights balancing as important in all ICS situations. In doing so, this paper draws on the author's research throughout the course of her doctoral study. It does not deal exhaustively with the issue of rights balancing in ICS; in some respects, it raises questions relating to this aspect of ICS which will require future attention, outside of the doctoral thesis.

Drawing on the public international human rights law framework, this paper particularly focuses on the child's CRC rights, given the child's heightened vulnerability in ICS situations. Recognising that the child's rights are indivisible, interdependent and interrelated in nature,[7] ICS raises particular risks to the child's rights to identity preservation, family environment, nationality, health and their safety and wellbeing.[8] Where relevant, this paper draws on opinions of UN treaty bodies and jurisprudence from domestic courts and the European Court of Human Rights (ECtHR).[9] Consideration of such jurisprudence assists in analysing how competing rights and interests in ICS might be balanced. The case-law referenced in this paper is either directly relevant given it addresses a situation involving surrogacy, or, given the fact-dependent nature of decisions in the human rights field, the decision's relevance by analogy to ICS.

The concept of the best interests of the child[10] is also of particular importance to this paper's discussion. As the Committee on the Rights of the Child states in its General Comment on the best interests of the child, "[T]he child's best interests shall be applied to all matters concerning the child or children, and taken into account to resolve any possible conflicts among the rights enshrined in the Convention or other human rights treaties. Attention must be placed on identifying possible solutions which are in the child's best interests."[11]

Bearing the above in mind, this paper discusses rights balancing in ICS in relation to the following four aspects:

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7 United Nations Committee on the Rights of the Child, General Comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1), UN Doc. CRC/C/GC/14 (2013) at [16](a).

8 As discussed in Chapters 3 and 5 of this thesis, and elaborated on in Chapter 7 (nationality) and Chapter 8 (identity).

9 Because the ECtHR remains the supranational human rights court with the most advanced jurisprudence on rights balancing. The ECtHR is required to assess applications to determine if a fair balance has been struck between the competing rights and interests at play. See J.H. Gerards, 'Fundamental Rights and Other Interests: Should it Really Make a Difference?', in E. Brems (ed.), Conflicts between Fundamental Rights, (2008), 680.

10 Art. 3, CRC, *supra* note 2.

11 UN Committee on the Rights of the Child, *supra,* note 7 at [33].

- Balancing the rights and interests of the unborn child with those of the surrogate mother;
- Balancing the rights and interests of the child with those of non-commissioning parent gamete donors (genetic parents);
- Balancing the rights and interests of the child with those of the commissioning parents; and
- Balancing the rights and interests of the surrogate mother with those of the commissioning parents.

The balancing of the child's rights with those of their commissioning parents forms the central discussion of this paper, given the reality that this is often one of the main points of conflict in ICS situations. While placing a central focus on the child, this paper concludes by assessing the prospects for an overall balancing of rights and interests between the four core parties as rights-holders in ICS. In doing so, it considers how best in practice to strike a balance between the range of competing – and often irreconcilable – rights and interests in this fraught and burgeoning area of family formation.

2 Balancing the Rights and Interests of the Unborn Child with those of the Surrogate Mother

The question of whether an unborn child can be said to have rights or interests is an ambiguous area of law.[12] Strong arguments exist in support of and against human rights attaching to children before birth. For example, the European Court of Human Rights (ECtHR) Grand Chamber has consistently held (since *Evans v. United Kingdom*[13]) that an embryo has no right to life under Article 2 of the ECHR;[14] the majority of states recognise human rights as attaching from birth onwards. However, preambular paragraph nine of the CRC leaves open the possibility of pre-birth human rights protection, despite not requiring it.[15] Many of the child's CRC rights are at risk before birth in ICS, vulnerable to decisions and actions taken by other core parties to an ICS arrangement[16] while the child is in utero and before conception.[17] The main

12 See discussion in Achmad, *supra* note 3, at 135ff of this thesis.

13 *Evans v. United Kingdom,* Decision of 10 April 2007, Judgment (Merits), Court (Grand Chamber), App. No. 6339/05.

14 Ibid., at [56].

15 Preambular para. 9, CRC, *supra* note 2 imports the following wording from the Declaration of the Rights of the Child: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."

16 E.g. commissioning parent(s), surrogate mother.

17 For discussion of the ways in which the child's rights are made vulnerable as a result of the actions and decisions of other core parties to ICS before the child's conception and once the child is in utero, see Achmad, *supra* note 3, at 135-138 of this thesis.

CRC rights at risk due to actions and decisions occurring during these pre-birth stages in ICS are the child's right to preserve identity,[18] to as far as possible know and be cared for by his or her parents,[19] health rights,[20] and the right to be free from discrimination[21] and not to be sold or trafficked.[22] Therefore, it is necessary to consider how the situation of an unborn child in ICS may be balanced with the rights and interests of his or her surrogate mother. For example, to what extent does a surrogate's rights and interests outweigh the fact she is carrying an unborn child with the potential to become a human being? This is relevant in ICS situations where the surrogate decides she no longer wants to carry the child and might harm the child, or seeks an abortion; where the surrogate's health is endangered during pregnancy; and where the surrogate engages in risky behaviour (for example, alcohol or drug abuse) during pregnancy which might harm the unborn child.

2.1 Leading decisions of the European Court of Human Rights and United Nations Human Rights Committee concerning abortion relevant by analogy to rights balancing in ICS

Analysis of some leading case-law concerning abortion is illustrative of the balancing of rights and interests which can be extended by analogy to rights balancing between the unborn child and surrogate in ICS situations. The balancing of rights and interests has occurred in a number of non-ICS cases where pregnant women have been prevented from accessing abortion. In *Tysiąc v. Poland*[23] (ECtHR), a woman was prevented from having a legal abortion despite a medical condition which meant that through pregnancy, her already partial blindness greatly deteriorated to near complete blindness.[24] It was

18 Art. 8(1), CRC, *supra* note 2: "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference."

19 Art. 7(1), CRC, *supra* note 2: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality *and as far as possible, the right to know and be cared for by his or her parents*." (emphasis added)

20 Art. 24, CRC, *supra* note 2.

21 Art 2(1), CRC, *supra* note 2 stipulates that States Parties to the CRC shall ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind.

22 Art. 35, CRC, *supra* note 2: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." The sale of children is defined by Art. 2(a) as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration nor any other consideration." See United Nations General Assembly, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UN Doc. A/RES/54/263 (2000).

23 *Tysiąc v. Poland*, Decision of 20 March 2007, Fourth Section Judgment, App. No. 5410/03.

24 Ibid., at para. [65].

because of this risk to her health that she sought an abortion.[25] On the facts, the Court found a violation of Article 8 of the European Convention on the Protection of Fundamental Rights and Freedoms (ECHR),[26] as "[T]he refusal to terminate the pregnancy had exposed her to a serious health risk".[27] The Court thus recognised the health of the mother as paramount, with her rights and interests outweighing the existence of the unborn child she carried and its potentiality to become a human being.

Following *Tysiąc*, the ECtHR Grand Chamber held in *A., B. and C. v. Ireland* that there is no absolute right to abortion (and that this is not conferred by Article 8 ECHR).[28] This decision concerned three women who had become unintentionally pregnant. Irish law prohibits abortion for health and well-being reasons, but allows a woman to travel overseas for abortion in instances where she risks being directly affected by this prohibition[29] and there is a constitutional right to abortion in situations where a real and substantial risk exists to the woman's life. The Grand Chamber applied *Vo v. France*[30] in *A., B. and C. v. Ireland*, holding that "[S]ince the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother."[31] However, the Grand Chamber said this margin of appreciation is not unlimited and a "prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of prenatal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature."[32]

The Grand Chamber therefore held that in instances where real and substantial risk to the pregnant woman exists, lack of access to lawful abortion in Ireland amounted to a State failure to implement this constitutional right.[33] One of the three applicants seeking an abortion in *A., B. and C. v. Ireland* was in remission from a rare form of cancer and feared for her life because of the risk pregnancy could trigger relapse. The Grand Chamber found a violation of this applicant's Article 8 ECHR right to respect of private and family life,

25 Ibid., at para. [77].
26 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950, ETS 5, Art. 8, right to respect of private and family life.
27 Ibid.
28 *A, B and C v. Ireland,* Decision of 16 December 2010, Judgment (Merits), Court (Grand Chamber), App. No. 25579/05, at [214].
29 Ibid., at [239].
30 *Vo v. France,* Decision of 8 July 2004, Judgment (Merits), Court (Grand Chamber), App. No. 53924/00.
31 *A, B and C v. Ireland*, *supra* note 28, at [237].
32 Ibid., at [238].
33 Ibid., at [250ff].

as she was unable to establish her right to a legal abortion via the medical services available in Ireland or through the Courts.[34] In assessing whether there had been an appropriate balancing of competing interests involved in relation to the other applicants, the Grand Chamber found no violation of their rights, holding that "the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn."[35] The ECtHR subsequently applied its decision in *A., B. and C. v. Ireland* in *P. and S. v Poland*.[36]

The Human Rights Committee (HRC) is the United Nations treaty body that has issued the leading views on situations involving the balancing of rights and interests between pregnant women and unborn children. Although this body of decisions remains small, among those communications it has considered on their merits is that of a young rape victim who was refused an abortion.[37] The HRC said the failure to provide the abortion constituted a violation of Article 7 ICCPR,[38] causing her mental and physical suffering.[39] Another communication considered on its merits by the HRC concerned refusal of a therapeutic abortion on an adolescent according to her wishes (the foetus having been diagnosed with anencephaly, inevitably meaning its death upon birth), in circumstances where the pregnancy constituted a medically certified life threatening risk.[40] The Committee said refusal was unjustified, violating Article 17 ICCPR.[41]

2.2 Striking a balance between the rights and interests of the unborn child and the surrogate in ICS

The ECtHR and UN treaty body decisions discussed above demonstrate that in situations which may arise in ICS – such as a surrogate mother seeking an abortion for medical (including psychological) reasons – the balance of rights

34 Ibid., at [263].
35 Ibid., at [241].
36 Confirming the view that Article 8, ECHR does not confer the right to abortion, but the prohibition of abortion when sought on health and/or well-being grounds falls within the scope of Article 8. (at para 96)
37 UN Human Rights Committee, Communication No. 1608/2007 of 28 April 2011, UN Doc. CCPR/C/101/D/1608/2007.
38 No one shall be subjected to cruel, inhuman or degrading treatment or punishment.
39 UN Human Rights Committee, *supra* note 38 at [9.2].
40 UN Human Rights Committee, Communication No. 1153/2003 of 22 November 2005, UN Doc. CCPR/C/85/D/1153/2003.
41 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. One Committee member dissented, asserting Article 6, International Covenant on Civil and Political Rights (right to life) was also violated given the girl's life was gravely endangered. See: United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

and interests is likely to weigh heavily towards the surrogate. This will mean the unborn child's future rights and interests will be subordinated to the surrogate's rights and interests, in order to protect her health and wellbeing, and potentially, her right to life.[42] In ICS situations where a surrogate does not seek an abortion but a risk to her health or life presents during pregnancy, weighing the rights and interests at play between the surrogate and the unborn child in favour of the surrogate is also an appropriate balance to strike. This will be especially the case when the risks to the surrogate mother's health are serious and pose long-term detrimental effects to her health and well-being (as was the case in *Tysiąc v. Poland)*. Such a balance upholds the mother's right to health[43] and safeguards her reproductive autonomy[44] and right to life recognising that she is a living rights-holder.

To not strike a balance in favour of the surrogate in such ICS situations would in effect prioritise the potentiality of an unborn human being and its associated future rights and interests over the life of an existing human being with rights and interests. This would be inconsistent with fundamental human rights principles and concepts, including human dignity.[45] As will be discussed below shortly, in ICS situations where the surrogate wants to take particular actions concerning the unborn child, her rights and interests are likely to also conflict with those of the commissioning parents. Therefore, a further layer of rights balancing will be required, for example, in cases of surrogate-proposed abortion in ICS. Additionally (as discussed below in Section 5), this may occur in reverse, where commissioning parents seek to abort a child in ICS.

An alternative set of circumstances in which the rights and interests of the surrogate mother may require balancing in relation to the existence of the unborn child in ICS is where the surrogate engages in behaviour which may be harmful to the unborn child's health. Such circumstances can be envisaged where a surrogate decides she is not going to follow through with the ICS

42 Under Article 6, ICCPR, every human being has the inherent right to life.

43 Article 12, International Covenant on Economic, Social and Cultural Rights: Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. See: United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

44 E.g. as safeguarded by Art. 16(1)(e), United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13.

45 As made clear in the Universal Declaration of Human Rights (see: preamble; Art. 1). See: United Nations, Universal Declaration of Human Rights, 1948. The principle of human dignity is re-stated in the other core international human rights treaties, e.g. the preamble of CEDAW: "Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity."

arrangement and becomes harmful towards the unborn child she carries[46] or in instances where the surrogate engages in practices during pregnancy recognised as harmful to foetal health. A leading case relevant by analogy is *Winnipeg Family and Child Services v. G*,[47] in which the Canadian Supreme Court considered the case of a pregnant woman with various substance addictions; two of her previous three children were born brain damaged as a result of her substance abuse. Canadian child protection authorities sought to have the woman admitted to drug therapy to prevent further damage to the unborn child. However, despite the potential damage to the foetus, the Court held authorities could not force her to undergo treatment to prevent foetal harm.[48] The balance is clearly struck in favour of the woman in this case, with the judgment upholding her right to reproductive autonomy, even in situations where there is evidence of harm or likely harm to an unborn child being carried in that woman's body.

This focus on the autonomy of the woman is consistent with the abortion case law already discussed. Yet the motivation underlying the balance is quite different; in the abortion jurisprudence, the motivation for striking a balance favouring the woman derives from seeking to protect her and uphold her right to health, reproductive autonomy and human dignity. However, *Winnipeg v. G* appears to favour the woman's rights and interests squarely on the basis of her autonomy rights. In doing so, such an approach fails to take a step towards preventing harm not only to the unborn child, but to the woman herself.

It is questionable whether this balance would be struck similarly in the case of an ICS surrogate who either actively tries to harm the child she carries, or who engages in behaviour which may cause harm to the unborn child. Akin to the abortion situation already discussed, this may be particularly questionable given the added layer of competing rights and interests of the commissioning parents in ICS arrangements. Indeed, unless a guardian is appointed to advocate for the future rights and best interests of the unborn child in an ICS arrangement, the unborn child does not have any personal agency to advocate for his or her future rights and best interests. However, in instances where commissioning parents view the surrogate as acting in a way potentially harmful to the unborn child she is carrying for them (either by omission or direct actions), they could, for example, argue for enforced measures in relation the surrogate on the basis that there are particular actions she should be

46 L.B. Andrews notes however from her interviews with (non-ICS) surrogates, that this is highly unlikely to occur, given the great care that surrogates demonstrate towards the surrogate child: "There is thus no reason to believe that surrogacy inevitably, or even in a significant minority of cases, would lead to the child being harmed by the surrogate's lack of concern for the child's well-being." See L.B. Andrews, 'Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood', (1995) 81 *Virginia Law Review* 2343, at 2354.

47 *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

48 Ibid., at [4].

undertaking or activities she should refrain from in order to protect the unborn child intended for them.

3 Balancing the rights and interests of the child with those of genetic donor parents

The rights and interests of children and their genetic donor parents may also conflict in ICS in one main respect, due to the privacy rights of genetic donor parents[49] and the identity[50] and health[51] rights of children conceived and born. Not all ICS arrangements will involve genetic donor parents (as sometimes commissioning parents are able to use their own gametes to create an embryo). However, when genetic donor parents are involved (i.e. who are not also commissioning parents), this rights conflict only becomes a rights balancing issue in instances where they act anonymously, or do not want to be contacted by or know their genetic children created through ICS.

3.1 A conflict between the genetic donor parents' privacy right and the rights and best interests of the child in ICS

In such instances, can genetic donor parents legitimately maintain their right to privacy? Although in the context of gamete donation for non-ICS assisted reproductive technology (ART), donors have in the past been able to maintain their right to privacy, there is now general acceptance that anonymous gamete donation is to be avoided in ART given the evidence of negative impacts for children of not knowing their genetic origins, in particular on their identity formation and understanding,[52] and their ability to know their genetic health

49 Art. 12, UDHR, *supra* note 45; Art. 17, ICCPR, *supra* note 41.

50 Art. 8, CRC, *supra* note 2.

51 Art. 24, CRC, *supra* note 2.

52 See for discussion: Clark, 'A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins' (2012) 40(3) *Georgia Journal of International and Comparative Law,* 619; M. Cowden, 'No Harm, No Foul: A Child's Right to Know Their Genetic Parents', (2012) 26(1) *International Journal of Law, Policy and the Family* 102; and S. Golombok and F. Tasker, 'Socioemotional Development in Changing Families', in M.E. Lamb and R.M. Lerner (eds.), *Handbook of Child Psychology and Developmental Science, Vol 3: Socioemotional Processes* (7th ed.), (2015), 419 at 441. Golombok and Tasker also note at 446 that "Children whose parents disclose their donor conception at an early age seem to integrate this information into their developing sense of self, whereas some donor offspring who find out about their donor conception in adolescence or adulthood report enduring psychological distress. Those who are aware of their donor conception may wish to search for their donor and donor siblings. Their main motivation is curiosity and the wish to incorporate information about their family background into their life story in order to develop a more complete sense of who they are."

history.[53] Indeed, the Committee on the Rights of the Child has been clear that anonymous gamete donation is inconsistent with the child's rights and best interests and should be avoided in the context of ART.[54]

It is worth considering that some contemporary legislative frameworks governing donor conception – such as that in the Netherlands[55] – establish a system of phased or gradual provision of donor information to donor conceived children. Under the Dutch legislation, non-identifying donor information including the donor's physical characteristics, education, occupation, and some information on social background and personal characteristics[56] can be provided to the child once they are 12 years of age and upon their request;[57] to the child's legal parents (at their request) before the child reaches 12 years of age; and medical data important to the healthy development of the child can be provided at the request of the child's doctor (no restriction specified concerning the child's age).[58] Identifying information (first and surnames, date of birth and place of residence[59]) is not available to the child until they reach 16 years, and only with the donor's written consent.[60] The Dutch legislation places the burden of requesting identifying information on the child,[61] and in instances where the donor does not want to disclose information, a balancing exercise is required to consider whether serious reasons exist for non-disclosure that outweigh the consequences for the child of not knowing the identifying information.[62]

However, even such a system of phased provision of identity information about genetic donor parents such as that established by the Dutch legislation does ultimately recognise that donor conceived children should have access to identifying information about their genetic parents. It remains difficult to envisage circumstances where the child's right to preserve their identity would not outweigh a donor's interests in non-disclosure. This is especially so given the significant, lifelong impact that not knowing full, identifying information about their genetic parent(s) may have on the child both in child and adulthood. Indeed, as the ECtHR has acknowledged, "an individual's interest in

53 M. Cowden, 'No Harm, No Foul: A Child's Right to Know Their Genetic Parents', (2012) 26(1) *International Journal of Law, Policy and the Family* 102 at 107.
54 See e.g. UN Committee on the Rights of the Child, Concluding observations regarding Denmark, 15 February 1995, UN Doc. CRC/C/15/Add.33, at [11].
55 Wet donorgegevens kunstmatige bevruchting 2002 (Artificial Insemination (Donor Information) Act 2002.
56 Ibid., Arts. 2(1)(a) and (b).
57 Ibid., Art. 3(1)(b).
58 Ibid., Art. 3(1)(1).
59 Ibid., Art. 2(1)(c).
60 Ibid., Art. 3(2).
61 Ibid., Art. 3(2).
62 Ibid., Art. 3(2).

discovering his or her parentage does not disappear with age, quite the reverse."[63]

3.2 Striking a balance between the rights and interests of the child and genetic donor parents in ICS

It is, therefore, difficult to maintain that genetic donor parents should have an absolute right to privacy in relation to the children who are born in ICS through their gamete donations. The involvement of genetic donor parents in ICS is clearly based on their own choice to donate gametes. In doing so, they are aware that their gametes may lead to the existence of a child through ICS, and as such permanently connect themselves into the child's life by virtue of the establishment of a genetic bond. Arguably, they cede their privacy right on this basis, with the awareness of the consequence that the child may wish to have contact with and know them as their genetic parent. The child's rights to preserve their identity and to attain the highest standard of health have a potentially large impact on the child's own lifetime outcomes; knowing their genetic origins and their genetic health history will likely positively impact their life in many ways. They will be able to form a full view of their personal narrative and understand where they came from. Consequently, they will have the opportunity to form their own identity informed by the genetic element, and will also be able to have the choice to proactively act on any genetic health history information indicating genetic disorder.

Knowing identifying information about their genetic donor parents will enable the child to at least attempt to know these people if the child wishes to do so, in order to preserve this aspect of their identity and gain a full understanding of their identity concerning its genetic aspect. Protecting the child's rights by ensuring they can know the identity of their genetic donor parent(s) is therefore consistent with a holistic approach to their rights and is in their best interests;[64] as a result, the balance should weigh in favour of the child's rights, rather than upholding the genetic donor parents' right to privacy.

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63 *Godelli v. Italy*, Decision of 25 September 2012, Second Section Judgment (Merits and Just Satisfaction), App. No. 33783/09. The ECtHR found a violation of Article 8, ECHR on the basis that the applicant, who was abandoned at birth and subsequently adopted, had been unable to find out the identity of her birth mother (who had declined to have her identity disclosed). At the time of the judgment, the applicant was 69 years old and argued she had suffered severe damage because she was unable to know her personal history through accessing identifying or non-identifying information about her birth mother; she argued that as a result, a balance had been struck entirely in favour of her birth mother's interests. The Court found that by preventing the applicant from accessing any identity related information, Italy had not struck a fair balance to achieve proportionality between the applicant's right to identity (and therefore access information about her origins) and her birth mother's right to remain anonymous.

64 UN Committee on the Rights of the Child, *supra* note 7.

Recognising this, ideally anonymous genetic donors should not involve themselves in ICS (and future regulation of ICS should guard against this). However, in instances where they do anonymously become genetic parents in ICS or seek to maintain anonymity (that is, refusing the disclosure of identifying information), decision-makers should take active steps wherever possible to uphold and enforce the child's rights to identity and health (consistent with their overall best interests) and recognise these as outweighing the genetic donor parents' privacy right.

4 Balancing the rights and interests of the child with those of the commissioning parents

As already alluded to above, in ICS situations, the rights and best interests of the child will, in some instances, need to be balanced with the rights and interests of the commissioning parents. This may seem contradictory, given that it is the commissioning parents who seek to bring the child into the world and if commissioning parents did not take steps to undertake an ICS arrangement, the child would not come into existence. Regardless of whether or not the child is genetically related to their commissioning parents, it is important to remember that the whole enterprise of ICS is premised on the wishes of commissioning parents to build a family with children or to add more children to their family. However, in considering these two groups, it is quickly apparent that the child's rights and interests may in fact conflict with those of the commissioning parents in ICS; indeed, it is this conflict that presents the central balancing exercise necessary in ICS.

4.1 The rights and best interests of the child in conflict with the rights and interests of the commissioning parents in ICS

Given the deliberate, planned nature of creating a child through ICS, Davis' observation regarding parenthood becomes particularly apt: "The decision to have a child is never made for the sake of the child, for no child then exists. We choose to have children for myriad reasons, but before the child is conceived, those can only be self-regarding. The child is a means to our ends. […] But morally the child is first and foremost an end in herself."[65] However, often, it is the wishes of commissioning parents and how these manifest in practice in ICS arrangements through their decisions and actions that cause a conflict with the child's rights and best interests. In most ICS arrangements, this conflict arises without any negative intention from commissioning parents,

65 D.S. Davis, *Genetic Dilemmas: Reproductive Technology, Parental Choices and Children's Futures* (2nd ed.), (2010), at 43.

but as a result of the decisions and actions they take. For example, the commissioning parents may use anonymous donor gametes to conceive a child through ICS, thus placing their interest in having a child in conflict with the child's right to preserve their identity. This exemplifies what Davis describes as a parental decision that limits choices for the child as they grow up into adulthood,[66] "insufficiently attentive to the child as an end in herself. By closing off the child's right to an open future, they define the child as an entity who exists to fulfil parental hopes and dreams, not her own."[67] A further example of a possible conflict is whether or not the commissioning parents are committed to caring for any child born through their ICS arrangement, regardless of whether the child is male or female, born with a disability or serious health condition, and if there are multiple births through the arrangement.

From a child rights perspective, the core focus when balancing the rights and interests of these groups should be on ensuring the paramountcy of the child's rights and best interests, to ensure they are upheld and not subordinated to the rights or interests of their commissioning parents. In addition to what the Committee on the Rights of the Child has stated regarding how the child's best interests principle should be taken into account in resolving rights conflicts and to reach solutions, the Committee makes clear that the child's special situation based on their dependency, maturity, legal status and voicelessness[68] necessitates treating the child's best interests as a primary and sometimes paramount consideration, beyond being treated as being at the same level as all other considerations.[69] Therefore, in instances where the child's rights and best interests conflict with the rights of other persons, as is the case in the scenarios raised in this paper, the Committee says that these conflicts must be "resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise."[70] Moreover, where harmonisation of these conflicting rights and interests is not possible, the Committee asserts that "authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best."[71]

However, before considering how the competing rights and interests of the child and commissioning parents might be balanced in ICS, it is useful to consider whether there is a right to be a parent or to have children, as well

66 Ibid., at 5.
67 Ibid., at 44.
68 UN Committee on the Rights of the Child, *supra* note 7, at [37].
69 Ibid., at [37]-[38].
70 Ibid., at [39].
71 Ibid.

as the concept of involuntary childlessness. These present two factors sometimes underlying the actions and decisions of commissioning parents in ICS and bringing them into conflict with the child's rights and best interests.

4.2 Is there a right to have a child?

This question is analysed below from two key angles, namely whether a right to a genetic child or to adopt exists.

4.2.1 Is there a right to a genetic child?

The aforementioned case of *Evans v. United Kingdom* is arguably the leading authority on this question. Ms. Evans desired genetic children but required surgery to remove her ovaries, so she and her then-partner had embryos created and stored. However, they subsequently separated; Ms Evans wished to proceed to undergo embryo implantation (no eggs were separately frozen) but her ex-partner withdrew his consent to use of the embryos, seeking their destruction. Ms Evans sought to prevent their destruction but her claims were rejected by the UK courts.[72] The Grand Chamber of the ECtHR held that Article 8 ECHR encompasses the right to respect for an individual's decision to become or not become a parent,[73] and moreover held that the right to respect for the decision to become a genetic parent falls within the scope of Article 8.[74] Balancing the competing rights and interests of the parties to the IVF treatment (Ms Evans and her ex-partner) was therefore required. As White and Ovey note, "There was a clash of rights here: between respect for the private life of the woman who chose to become pregnant, and the private life of the man to choose not to become a parent with a woman with whom his relationship had ended."[75]

The Grand Chamber said that the interests must be balanced fairly; hers should not carry greater weight than his.[76] It held that a fair balance had been struck and that the applicable UK legislation requiring continuing consent for use by every person donating gametes was not inconsistent with Article 8 ECHR (there was no Article 8 violation).[77] However, the joint dissenting opinion propounds the view that there was a failure to strike a fair balance between the parties, as upholding the ex-partner's view effectively cancelled out Ms

72 For discussion, see N. Hammond, *Case Commentary: Evans v the United Kingdom,* 1-2 (2007), available at http://www.ccels.cardiff.ac.uk/archives/issues/2007/hammond.pdf
73 *Evans v. United Kingdom, supra* note 13, at [71].
74 Ibid., at [72].
75 C. Ovey and R.C.A. White, *Jacobs & White The European Convention on Human Rights,* 2014, at 400.
76 Ibid., at [90].
77 Ibid., at [79].

Evan's view, and it was impossible under the legislation to strike a balance between the competing interests.[78] Indeed, despite *Evans v. UK* standing for the principle that there is no absolute right to become a parent to a genetic child (even in a situation such as this, where there is no other chance of a person becoming a genetic parent), what the dissenting opinion highlights is the acute complexity in striking balance in these types of cases where competing rights and interests collide.

An earlier case from the English jurisdiction, *R v. ex parte Blood*[79] (UK Court of Appeal) involved a similar situation, however, Mrs Blood's husband was in a coma and she sought permission to use his semen via 'artificial insemination by husband' (AIH) to have a child genetically related to her and her husband. The UK Human Fertilisation and Embryology Authority refused permission; Warnock notes the Authority was strongly of the view that "posthumous children were bound to suffer psychological trauma".[80] The UK Court of Appeal further ruled Mrs Blood could not seek AIH in the UK as written consent from her husband was required under the relevant legislation and this did not exist. However, the Court considered Ms Blood could have the sperm exported for AIH outside the UK (within the European Union).[81] Therefore, she underwent AIH in Belgium and successfully had a child, fulfilling her desire to have a child who was genetically related to both her and her husband.[82] Similarly in Australia, in *Jocelyn Edwards; Re the estate of the late Mark Edwards*[83] the New South Wales Supreme Court granted a woman permission to use her dead husband's sperm to enable a genetic child to be born, in the absence of his written consent. The Court struck this balance even though the regular requirement under NSW law is written consent from the donor for the use of their gametes.[84]

The governing law in both *Edwards* and *Blood* also required written consent of the donor. Despite this, in both cases there was an absence of consent but the Courts, to differing extents, facilitated an avenue whereby the woman could be enabled to have a child genetically related to her husband. In both cases there had been a long-term marital relationship, and the husband was unable to consent – in *Blood* due to him being comatose, and in *Edwards* due to him

78 *Evans v. United Kingdom, supra* note 7, Joint Dissenting Opinion of Judges Turmen, Tsatsa-Nikolovska, Spielmann and Ziemele, at [7].

79 *R v. ex parte Blood*,[1997] 2 All ER 687.

80 M. Warnock, *Making Babies: Is there a right to have children?*, (2002), at 4.

81 BBC News, *Widow Allowed Dead Husband's Baby*, available at http://news.bbc.co.uk/onthisday/hi/dates/stories/february/6/newsid_2536000/2536119.stm

82 J. Laurance, *Diane Blood Tells of Joy at Dead Husband's Child, The Independent*, 29 June 1998, available at http://www.independent.co.uk/news/diane-blood-tells-of-joy-at-dead-husbands-child-1168283.html Mrs. Blood had a second child using her late husband's sperm in 2002, also through a Belgian clinic. See: http://www.theguardian.com/uk/2002/feb/09/health.healthandwellbeing and http://news.bbc.co.uk/2/hi/uk_news/england/2139525.stm

83 *Jocelyn Edwards; Re the estate of the late Mark Edwards*, [2011] NSWSC 478.

84 Ibid., at [151].

being deceased. However in the *Evans* case discussed earlier, one of the living adults who had donated material to create the embryo had withdrawn consent; the balancing exercise in *Evans* was therefore different to that in *Edwards* and *Blood* (refusal to consent, not absence of consent). The balance in *Evans* was equally weighed between the man and the woman, with the outcome being that consent from both parties was required for the use of the embryos. However, something not comprehensively considered by the ECtHR in *Evans* is the rights balancing exercise regarding how allowing use of the embryos by one genetic parent against the express wishes of the other could negatively impact on any child born as a result. Such a child could potentially grow up believing they were unwanted by one genetic parent, and may also not have a chance to know that parent, which would be inconsistent with the child's best interests. Given the impact that the decision in *Evans* would have had on any future child born as a result of use of the embyros, more comprehensive consideration of the future child's situation would have led to a holistic rights balancing approach.

Since its decision in *Evans*, the ECtHR has largely maintained a consistent position concerning the issue of respect for decisions to have genetic children: this is an issue falling under Article 8 ECHR and although it falls within the state's margin of appreciation, the appropriate balance must be struck. In *Dickson v. United Kingdom*,[85] the Grand Chamber held that the refusal of access to artificial insemination facilities to a prisoner and his wife amounted to a violation of Article 8; in a matter of such significance to the applicants, the Grand Chamber held the UK had not struck a fair balance between the competing private and public interests involved.[86] In assessing whether the appropriate balance had been struck, the Grand Chamber found it important that this was the couple's only realistic opportunity to have a child together.[87] In making this assessment, the Grand Chamber said the state's margin of appreciation will be restricted "where a particularly important facet of an individual's existence or identity is at stake (such as the choice to become a genetic parent)".[88] Regarding the potential birth of a child through the provision of access to artificial insemination facilities to the applicants, the Grand Chamber said "the State has a positive obligation to ensure the effective protection of children. However, that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released."[89]

85 *Dickson v. United Kingdom*, Decision of 4 December 2007, Grand Chamber Judgment, App. No. 44362/04.
86 Ibid., at [85].
87 Ibid., at [72]
88 Ibid., at [78].
89 Ibid., at [76].

Therefore, in the Grand Chamber's view, any potential concerns for the future child's welfare was not a factor preventing access to artificial insemination to enable the applicants to exercise their decision to try to become genetic parents.

In Australia, a similar case to *Dickson* was the subject of a decision on appeal in the Victorian Civil and Administrative Tribunal. In *ABY & ABZ v. Secretary to the Department of Health & Anor (Human Rights),*[90] ABY and his partner alleged a breach of their human rights as they were denied ART treatment based on his status as a convicted, sentenced child sex offender.[91] What makes this decision particularly interesting is the Tribunal's consideration of the risk of harm to a child born through ART treatment being made available to the applicants. The legislation governing decisions regarding access to ART treatment includes the guiding principle that "the welfare and interests of persons born or to be born as a result of treatment procedures are paramount";[92] the Tribunal articulated the test to be applied as follows:

> 'This decision will be based on all the evidence that comes before it, including any evidence of factors potentially adverse to the well-being or best interests of the child […] A consideration of what constitutes the best interests of a child could include the physical, sexual, emotional and developmental well-being of a child. The part of the decision which pertains to considering the best interests of the child will first involve recognising, on the evidence before the decision-maker, any potential identifiable and established risk factors as supported by research and expertise in the field. Secondly, it must be decided either that these factors present a real risk of harm when applied to all of the circumstances in an individual case, and therefore a barrier to treatment arises, or that they do not, and therefore no barrier exists'.[93]

Therefore, the Tribunal stated that "The best interests and welfare of a child born as a result of a treatment procedure extend beyond the question of whether any such child would be at risk of sexual harm at the hands of ABY"[94] and said that it "must be satisfied that approving treatment is in the best interest of any child that will be born as a result".[95] The Tribunal was explicit that this requirement for the treatment to be consistent with the best interests of any child born as a result of the treatment and the welfare and interests of such children must be paramount.[96] It said it must "determine whether

90 *ABY & ABZ v. Secretary to the Department of Health & Anor (Human Rights)* [2013] VCAT 625.
91 Ibid., at [4].
92 s.5(a), Assisted Reproductive Treatment Act 2008 (Victoria).
93 *ABY & ABZ v. Secretary to the Department of Health & Anor*, *supra* note 90, at [31].
94 Ibid., at [32].
95 Ibid.
96 Ibid., at [33].

the treatment procedure is in the best interests of the child to be born."[97] Through a comprehensive analysis of the potential identifiable and established risk factors (including, for example, those associated with the offences for which ABY was convicted and sentenced), considering the opinions of expert witnesses, and taking into account protective and mitigating factors and "all matters relevant to the welfare and interests of the child"[98] the Tribunal reached the view that "to the extent that we have found that there are identifiable or established risk factors, […] there is no real risk of harm to a child to be born to ABY and ABZ as should constitute a barrier to treatment."[99] Ultimately, the Tribunal found that "there is no barrier to treatment, and that the carrying out of a treatment procedure is consistent with the best interests of a child who would be born as a result of the treatment procedure."[100]

A more recent ECtHR decision encompassing consideration of whether there is a right to a genetic child is the Grand Chamber's decision in *S.H. and Others v. Austria*.[101] The applicants were two couples experiencing infertility in different ways (both spouses were infertile in the situation of the first couple,[102] whereas in that of the second couple, only the woman was infertile[103]). Both couples were unable to access in-vitro fertilisation (IVF) in Austria, given applicable Austrian law prohibits donor sperm use in IVF, only allows the use of artificial insemination when introducing sperm into the reproductive organs of a woman,[104] and absolutely prohibits ovum donation.[105] The applicants claimed these prohibitions, which effectively barred them from being able to have a child who was genetically related to at least one of them, amounted to a breach of their Article 8 ECHR right to respect for private and family life.

The Grand Chamber confirmed that Article 8 encompasses "the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose", as such a choice to do so is an expression of private and family life.[106] In reaching this view, the ECtHR applied *Dickson* (the notions of private and family lives incorporate the right to respect for the decision to become genetic parents[107]). The Grand Chamber said the margin of

97 Ibid., at [124].
98 Ibid.
99 Ibid., at [127].
100 Ibid., at [128].
101 *S.H. and Others v. Austria,* Decision of 3 November 2011, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), App. No. 57813/00.
102 Ibid., at [11].
103 Ibid., at [12].
104 The prohibition exists under s3(1) Fortpflanzungsmedizingesetzof 1992 (Austrian Artificial Procreation Act), with the only exceptions provided under s3(2) of the Act.
105 s3(1) Fortpflanzungsmedizingesetzof 1992: ova may only be used for the woman from whom they originate.
106 *S.H. and Others v. Austria, supra* note 101, at [82].
107 Ibid., at [81], citing *Dickson v. United Kingdom*.

appreciation afforded to the State concerning gamete donation IVF is wide, based on lack of consensus among Member States and that IVF raises "sensitive moral and ethical issues against a background of fast-moving medical developments".[108] It held the margin of appreciation had not been exceeded in respect of either couple; there had been no breach of Article 8 (overturning the earlier decision of the First Section).[109] In his separate opinion, Judge de Gaetano asserted that "While there is no doubt that a couple's decision to conceive a child is a decision which pertains to the private and family life of that couple (and, in the context of Article 12, to the couple's right to found a family), neither Article 8 nor Article 12 can be construed as granting a right to conceive a child *at any cost*. The "desire" for a child cannot, to my mind, become an absolute goal which overrides the dignity of every human life."[110] With *S.H. and Others*, the ECtHR reinforces the view that a desire to have genetic children does not equate to a stand-alone right to have children, but that respect for a decision to try to have genetic children is encompassed in the Article 8 right to respect for private and family life, although States are free to regulate ART treatment under their margin of appreciation. As such, the right to respect for a decision to try to have genetic children can be limited.

Applying the case law discussed on whether there is a right to a genetic child to the ICS context, there cannot be understood to be a right to a genetic child *per se*. Therefore, arguments that ICS should be available at all costs in order to ensure access to genetic children are weak. Moreover, the best interests and rights of the child must be safeguarded. As ICS is not a practice provided or funded by governmental authorities, it is unlikely that claims of discriminatory treatment or availability of ICS will hold up if brought before the Courts or other adjudicative bodies; essentially, the current ICS market is governed by market forces, meaning those who can afford ICS can access the market.

4.2.2 Is there a right to adopt?

Turning to consider whether to be a right to adopt to become a parent exists, leading jurisprudence is again found in the ECtHR. The ECtHR declared inadmissible early applications concerning a right to adopt;[111] however, more recently the ECtHR has considered the merits of a number of cases addressing

108 Ibid., at [97].

109 In its decision of 1 April 2010, the First Section found that the fulfilment of the wish for a child should not be precluded by ART that is provided on a discriminatory basis (at [93]). It found that the different treatment was disproportionate and without justification, amounting to a violation of Art. 14, ECHR (prohibition of discrimination) read in conjunction with Art. 8, ECHR (at [85] and 94]).

110 *S.H. and Others v. Austria, supra* note 101, Separate opinion of Judge de Gaetano, at [2].

111 E.g. *X v. Belgium and the Netherlands*, Decision of 10 July 1975, Commission DR 7, 75, App. No. 6482/74 and *Di Lazzaro v. Italy*, Decision of 10 July 1997, Commission DR 90-B, 134, App. No. 31924/96.

this issue. Lestas posits that the ECtHR's willingness to assess this issue goes to the general ambit of rights protected under the ECHR.[112] In a number of instances, this line of cases has concerned claims of discrimination on the basis of sexual orientation (applicants arguing their sexual orientation has prevented them adopting). For example, in *E.B v. France*,[113] the Grand Chamber found the applicant had been discriminated against based on her sexual orientation as a lesbian, which interfered with her application to adopt a child.[114] However, in making this finding the ECtHR noted the *Conseil d'Etat* had appropriately taken into consideration whether being brought up by the applicant was consistent with the child's best interests (and this was found to be the case).[115] As Lestas elaborates, the significance of *E.B. v. France* is that it affirmed that adoption issues fall within the ambit of Article 8, when undertaking an examination of alleged discrimination under Article 14.[116] It is also worth noting that in the earlier decision in *Fretté v. France*,[117] the ECtHR's Former Third Section restated the importance of remembering that adoption is "providing a child with a family, not a family with a child",[118] thereby highlighting adoption as a means of child protection, and one that must only be pursued if it is in the best interests of the child, as made clear under Article 21 of the CRC.

The Grand Chamber has since dealt with this issue in *X and Others v. Austria*.[119] This was an application from two unmarried women living in a long-term relationship and the child of one of the applicants. It concerned the Austrian courts' decision to refuse granting the woman who was not the child's biological mother the right to adopt the child without severing the child's relationship with his biological mother (second-parent adoption). The Grand Chamber found a violation of Article 14 ECHR in conjunction with Article 8, based on the different treatment of the applicants compared with unmarried heterosexual couples seeking adoption of the other partners' child. It said that "[…] the Government has failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense

112 G. Letsas, 'No Human Right to Adopt?', (2008), 1 *UCL Human Rights Review* 151-152.
113 *E.B. v. France*, Decision of 22 January 2008, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), App. No. 43546/02.
114 Ibid., at [98].
115 Ibid., at [95].
116 G. Letsas, *supra* note 112, at 152.
117 *Fretté v. France,* (2002) 38 EHRR 438.
118 Ibid., at [42].
119 *X and Others v. Austria,* Decision of 19 February 2013, Judgment (Merits and Just Satisfaction) Court (Grand Chamber), App. No. 19010/07.

or for the protection of the interests of the child. The distinction is therefore incompatible with the Convention."[120]

However, the ECtHR made clear that Member States are not obliged under the ECHR to extend the right to second-parent adoption to unmarried couples,[121] and moreover explicitly stated that there is no guaranteed right to adopt under Article 8 ECHR.[122] In reaching its decision, regarding the rights of the child the ECtHR highlighted Articles 3 and 21 of the CRC, asserting "[…] the existence of *de facto* family life between the applicants, the importance of having the possibility of obtaining legal recognition thereof, the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes, and especially their admission that same-sex couples may be as suited for second-parent adoption as different-sex couples – cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples […] the considerations […] would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child".[123] Despite this statement, the joint partly dissenting opinion strongly criticised the majority judgment for not giving centrality to the child's best interests in its judgment.[124]

Like *S.H. and Others v. Austria* regarding genetic children, the leading jurisprudence on adoption therefore confirms that where the possibility to adopt is made available, this opportunity should be offered without discrimination, but regardless, the ECtHR line of cases discussed in this section underscores that there is no right to adopt. Extending this position by analogy to the ICS context, the argument that there can be said to be no absolute right to have a child via ICS is a strong one. Furthermore, drawing on the adoption jurisprudence, by extension it is clear that in ICS too, the child's rights and best interests must always be taken into consideration in decisions affecting them.

4.3 The concept of 'involuntary childlessness'

The consideration of the two lines of case law above demonstrates that there cannot be understood to exist a right to be a genetic parent or to be an adoptive parent. However, some people view ICS as their best (and perhaps final

120 Ibid., at [151].
121 Ibid., at [136].
122 Ibid., at [135].
123 Ibid., at [146].
124 *X and Others v. Austria, supra* note 119, joint partly dissenting opinion of Judges Casadevall, Zimele, Kolver, Joèiëne, Ðikuta, de Gaetano and Sicilianos, at [8].

or only) chance to become a parent,[125] and this can be identified as a core motivator for ICS commissioning parents who genuinely seek this.[126] Thus a further issue which must be briefly touched upon regarding whether there can be said to be a right to become a parent is the concept of 'involuntary childlessness', a term used to describe the state of affairs that leads commissioning parents to turn to ICS.[127] Smith-Cavros uses the term to describe individuals who are "unwillingly childless",[128] noting that with ICS, "Scenarios to achieve parenthood that were once impossible are made a possibility."[129] Palattiyl describes involuntary childlessness as the inability to conceive when individuals want to, and identifies ICS as a method addressing infertility and involuntary childlessness.[130]

Do individuals have a right not to be in a state of involuntary childlessness, and therefore to have a child and be a parent? Arguably, a broad interpretation of the right to found a family under Article 16(1) of the Universal Declaration of Human Rights covers building a family with children. However, it would be stretching the limits of such a broad interpretation to extend this to equate to an absolute right to have genetic or biologically related children, especially when there are other means available to found a family with children, such as adoption.

General Comment 19 of the UN Human Rights Committee[131] provides some guidance on this issue, in relation to Article 23 of the International Covenant on Civil and Political Rights (which builds on Article 16(1) UDHR).[132] The Human Rights Committee states that "The right to found a family implies, in principle, the possibility to procreate and live together."[133] Based on this statement, it is clear that the possibility of procreation should be respected

125 Australia is reported to have the largest number of commissioning parents who are engaging in ICS. See: M. Cooper et al (eds.), *Current Issues and Emerging Trends in Medical Tourism*, (2015) at 147.

126 However, it should not be ignored that some commissioning parents enter into ICS arrangements motivated by intentions which run directly counter to international human rights law norms and standards, e.g. to create a child for the purpose of sexual exploitation, sale or trafficking, as discussed later in this paper at section 4.4.

127 E.g., E. Smith-Cavros, 'Fertility and Inequality Across Borders: Assisted Reproductive Technology and Globalization', (2010) 4:7 *Sociology Compass* 466, at 468; G. Palattiyil, E. Blyth et al., 'Globalization and cross-border reproductive services: Ethical implications of surrogacy in India for social work', (2010) 53:5 *International Social Work* 686, at 688.

128 Smith-Cavros, *supra* 127 at [468].

129 Ibid.

130 Palattiyil and Blyth et al, *supra* note 127, at 688.

131 UN Human Rights Committee, General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23) 27 July 1990.

132 Article 23(1), ICCPR, *supra* note 41: "The Family is the natural and fundamental group unit of society and is entitled to protection by society and the State."; Article 23(2), ICCPR: "The right of men and women of marriageable age to marry and found a family shall be recognised."

133 UN Human Rights Committee, *supra* note 131, at [5].

and protected (and this aligns with other provisions in international human rights law establishing the right to reproductive autonomy and health[134]), but this does not correlate with an absolute right to have a child. Although reproductive health and freedom must be respected and protected,[135] and where it is made available by states, access to medical treatment to achieve the end of having a child should be made available without discrimination, there is nothing in international human rights law establishing an absolute right to have a child. Despite this, the desire of many involuntarily childless individuals to have a child and become parents will continue to motivate them to choose to undertake ICS, regardless of whether or not there is a right to do so.

4.4 Inserting the child's rights into the picture

The desire of commissioning parents to have a child is the key driver behind ICS arrangements. As this desire can sometimes obscure the focus on upholding the child's rights in ICS and undertaking decisions in the child's best interests, steps must be taken to ensure these are safeguarded. The child's rights and best interests must be balanced against any rights and interests of the commissioning parents; however, the child's rights and interests – as the most vulnerable party of the two, lacking agency to advocate for their own interests during infancy and early years, and given the special nature of childhood[136] – must be inserted into the centre of the picture, especially given the range of potential rights violations that children are vulnerable to within ICS. As Michael Freeman asserts, "Children easily become victims",[137] and further, "Children are particularly vulnerable and need rights to protect their integrity and dignity."[138]

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134 E.g. Art. 16(1)(e), CEDAW, *supra* note 44; Art. 11(1)(f), CEDAW: protection of health and safety in working conditions, including safeguarding of reproductive function; also N.B. the right to the highest attainable standard of health (Art. 12, ICESCR) includes "the right to control one's health and body, including sexual and reproductive freedom". See Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), (2000), UN Doc. E/C.12/2000/4, at [8]. N.B. the World Health Organisation defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." Constitution of the World Health Organisation, Preamble, (1946).

135 Among other things, the Committee on Economic, Social and Cultural Rights states that "Reproductive health means that women and men have the freedom to decide if and when to reproduce". See Committee on Economic, Social and Cultural Rights, General Comment No. 14, ibid., at fn. 12.

136 As noted in preambular para. 4, CRC, *supra* note 2, and UN Committee on the Rights of the Child, *supra* note 7, at [37].

137 M. Freeman, "Taking Children's Rights More Seriously", (1992) 6 *International Journal of Law and the Family* 54.

138 Ibid., at [55].

In ICS, it is crucial that the following statement by the Committee on the Rights of the child is at the forefront of all decisions and actions concerning the child: there must be "a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned."[139] Furthermore, as the ECtHR has observed in a judgment concerning adulterine children, a key principle when balancing the rights and interests of children with adults is that children cannot be blamed for circumstances for which they are not responsible, but for which their parents are.[140]

It is crucial therefore in ICS to acknowledge that adults do not necessarily always have children's best interests at heart.[141] In extreme ICS cases, adults may not act consistently with the best interests of the children they commission, for example in cases where those children are created for the purpose of sale, illegal adoption, trafficking or with other sinister intentions in mind (for example, sexual exploitation or other forms of child abuse). Decision-makers in ICS must remain alert to this possibility, and weigh rights and interests with this in mind. But in the more usual run of ICS cases, the commissioning parents may simply not think to place the interests and rights of the child they commission at the forefront of their concerns, given their own overriding wish for a child. Furthermore, commissioning parents may not realise their own interests will not always align with the child's rights and best interests in ICS, and they may not know actions are necessary to be taken or avoided in order to ensure the protection of the child's rights, consistent with their best interests. Due to such a lack of foresight or focus, issues such as statelessness and identity preservation may become problematic and lead to violations of the child's rights under the CRC and other international human rights instruments.

4.5 Striking a balance between the rights and interests of the child and the commissioning parents in the specific situation of ICS

A balance must be struck between these competing rights and interests, bearing in mind the primacy of the best interests of the child. It may be necessary for a balancing of competing rights and interests between commissioning parents and children in ICS situations to be undertaken on a case-by-case basis by key decision-makers such as social workers, government ministers and judges. When framing future policies and legislation governing ICS or applicable to

139 UN Committee on the Rights of the Child, *supra* note 7, at [40].

140 *Mazurek v. France,* Decision of 1 February 2000, Judgment (Merits and Just Satisfaction), Court (Third Section), App. No. 34406/97, at [54].

141 Ibid.

ICS situations, policy-makers and legislators will also need to consider the appropriate balance to be struck between commissioning parents and children born through ICS. Analysis of selected jurisprudence relevant by extension to some of the rights and interests of children born from ICS arrangements is helpful when considering rights balancing between commissioning parents and children. This is presented below in section 4.5.1, before examining how the child's rights and best interests have been balanced with commissioning parents' rights and interests in leading ICS jurisprudence (section 4.5.2).

4.5.1 Selected jurisprudence relevant to the balancing of commissioning parents' and children's rights and best interests in ICS

Firstly, on issues of welfare and best interests, the UK High Court decision *In the Matter of TT (a Minor)*,[142] considered a traditional domestic surrogacy arrangement which broke down with the surrogate refusing to give up the child, T, following birth. T is the genetic child of the commissioning father and the surrogate. The commissioning father contested the surrogate's actions in the UK High Court, at which time T was 5 months old. The Court refused granting a residence order to the commissioning father, instead ordering T reside in the surrogate's (genetic mother) care. Baker J. accepted the surrogate's submission that during the course of her pregnancy, she changed her mind about handing over the baby,[143] and said that in considering the case, the Court's paramount consideration was the child's welfare.[144] Baker J. adopted the approach previously applied in Re P (Surrogacy: Residence);[145] the question to be asked was "which home is T most likely to mature into a happy and balanced adult and to achieve her fullest potential as a human?"[146] Baker J. said

> 'On balance, I have reached the clear conclusion that T's welfare requires her to remain with her mother. In my judgment, there is a clear attachment between mother and daughter. To remove her from her mother's care would cause a measure of harm. It is the mother who, I find, is better able to meet T's needs, in particular her emotional needs. […] I am less confident that Mr. and Mrs W would respect the relationship between T and her mother were they to be granted residence.'[147]

The Court's reasoning places central focus on what was in T's best interests, weighing these in relation to her commissioning/genetic father's interest in having T in his full-time care. In doing so, the Court held that preserving the

142 *In the Matter of TT (a Minor),* [2011] EWHC 33 (Fam).
143 Ibid., at [34].
144 Ibid., at [54].
145 Re P (Surrogacy: Residence), [2008] 1 FLR 177.
146 *In the Matter of TT (a Minor), supra* note 142, at [57].
147 Ibid., at [73].

child's attachment with the surrogate/genetic mother, and preventing the harm that might have been caused by removing her from this relationship outweighed the interests of the commissioning father. A number of factors concerning the father's behaviour were considered by the Court, and seen to indicate that he and his wife were less equipped to protect T's needs,[148] especially her emotional needs.[149] Taking a holistic, lifetime approach to the balancing exercise, the Court not only considered in whose care T's best interests would be best protected in the short-term, but also attached importance to the question of in whose care T would be more likely to achieve her full human potential as she developed from childhood to adulthood. This judgment is a clear example of a decision-maker prioritising the child's best interests over those of their commissioning parents (and in particular in this instance the commissioning/genetic father) on the basis of reasoning weighing in favour of T remaining in the care arrangement that was already established with her surrogate/genetic mother. As Gerards notes, individual rights can be restricted if good (that is, convincing) reasons exist to do so;[150] this decision demonstrates how a balancing of rights can result in a restriction of a commissioning parent's rights in favour of prioritising the child's rights and best interests. Lastly, it is important to note that the Court safeguarded T's right to preserve her identity in relation to her genetic father by making a contact order in his favour.

Leading ECtHR child abduction jurisprudence is also worth highlighting in relation to balancing the child's rights and interests with their commissioning parents' interests in ICS. President Costa notes, "In the Strasbourg case-law, the principle of giving priority to safeguarding the best interests of the child is firmly established",[151] and the best interests of the child must be considered on a case-by-case basis as part of a balancing exercise.[152] Indeed, in many judgments, the ECtHR has been explicit regarding this balancing exercise; for example, in *Yousef v. The Netherlands*,[153] the ECtHR reiterated that "in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail."[154]

148 Ibid., at [35]-[52].
149 Ibid., at [69]-[70].
150 Gerards, *supra* note 4, at 132.
151 J.P. Costa, *The Best Interests of the Child in the Recent Case Law of the European Court of Human Rights*, Speech to the Franco-British-Irish Colloque on Family Law, (14 May 2011), at 2.
152 Ibid., at 5.
153 *Yousef v. The Netherlands*, Decision of 5 November 2002, Judgment (Merits), Court (Second Section), App. No. 33711/96.
154 Ibid., at [73]. This application concerned the claim of a genetic father to be recognised as a child's legal parent; the Court ultimately found that the correct balance had been struck between the rights of the applicant and the child, holding that the Netherlands had not violated Article 8, ECHR in refusing to recognise the applicant as the child's legal father.

In this respect, ECtHR child abduction jurisprudence is perhaps the most relevant line of case law with relevance to the balancing of the child's rights and interests with their commissioning parents' interests in ICS. In *Neulinger and Shuruk v. Switzerland*,[155] the Grand Chamber was not convinced it would be in the best interests of the abducted child who was at the centre of the application to return to Israel from Switzerland. The child was highly integrated into Swiss society with his mother; removing him to Israel would cause him significant disturbance, a fact which in the Grand Chamber's view, needed to be weighted heavily in the balancing of rights and interests.[156] The Grand Chamber said it had to weigh any benefit that the child would receive from being returned to Israel against any disturbance it might cause him;[157] it found that return to Israel would not provide circumstances conducive to the child's well-being.[158] Also relevant in this balancing exercise was the fact that the child's father's right of access had been subject to restrictions before the child's abduction; furthermore, if the child's mother was made to return to Israel, this would trigger disproportionate interference with her right to respect for family life. In reasoning consistent with the CRC, the Grand Chamber said "there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount".[159] Thus whilst balancing and striking a fair balance between competing interests, the child's best interests must be protected and upheld and treated as the most important consideration.

In another leading child abduction judgment, *X v. Latvia*,[160] the Grand Chamber stated the best interests of the child "do not coincide with those of the father or the mother",[161] and it again held that the best interests of the child must be the primary consideration in the decision-making process on whether the child should be returned, in this instance from Latvia to Australia. It observed that "The decisive issue is whether the fair balance that must exist between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters, taking into account, however, that the best interests of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of 'the best interests of the child'."[162] In a concurring opinion, Judge

155 *Neulinger and Shuruk v. Switzerland*, Decision of 6 July 2010, Judgment (Grand Chamber), App. No. 41615/07.
156 Ibid., at [151].
157 Ibid., at [148].
158 Ibid.
159 Ibid., at [135].
160 *X v. Latvia*, Decision of 26 November 2013, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), App. No. 27853/09.
161 Ibid., at [100].
162 Ibid., at [95].

Pinto de Albuquerque significantly asserted that there is "universal acknowledgement of the paramountcy of the child's best interests as a principle of international customary and treaty law, and not a mere 'social paradigm'".[163]

Issues relating to the child's right to preserve their identity (Article 8 CRC) require significant attention in the rights balancing exercise in ICS situations, given the range of ways in which this right is open to violation.[164] The third party submissions by the German Government in *S.H. and Others v Austria* argued the concept of "split motherhood" that may eventuate for children born from some ART arrangements was contrary to the child's welfare,[165] leading to identity-related difficulties for the child.[166] The German Government asserted "Splitting motherhood into a genetic and a biological mother would result in two women having a part in the creation of a child. […] the resulting ambiguousness of the mother's identity might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity.[167] Applying this to the ICS situation, this view highlights that the child's right to preserve identity must be weighed against the rights and interests of the commissioning parents who seek a child through ICS, to establish whether on balance the child's right to preserve their identity will be protected. As it is in the child's best interests to be able to enjoy and exercise their identity preservation right, significant weight must attach to this in the rights balancing exercise. For example, it should be assessed if the commissioning parents plan to, or are taking active steps to protect the child's right to identity preservation and to ameliorate any potential negative impacts of ICS on this right. If commissioning parents do take active steps such as ensuring that information about the child's genetic parents (in ICS situations involving gamete donors) and surrogate mother is collected and preserved, and if they intend to share this with the child as they grow up, this may weigh in favour of the commissioning parents. This could be seen to evidence that they have actively sought to protect the best interests of the child, by ensuring their right to preserve their identity is upheld, as opposed to not having considered nor sought to protect the child's identity preservation right.

163 *X v. Latvia, supra* note 160, concurring opinion of Judge Pinto de Albuquerque.

164 As discussed in sections 2 and 5 C.Achmad 'Answering the "Who am I?" Question: Protecting the Right of Children Born Through International Commercial Surrogacy to Preserve Their Identity Under Article 8 of the United Nations Convention on the Rights of the Child', submitted for publication to *Human Rights Law Review;* appearing as Chapter 8 of this doctoral thesis.

165 *S. H and Others v. Austria, supra* note 101, at [53].

166 Ibid., at [53].

167 Ibid., at [53].

4.5.2 *Selected ICS jurisprudence balancing commissioning parents' and children's rights*

Moving beyond jurisprudence which is helpful by analogy in the ICS context, some ICS judgments issued by domestic courts and the ECtHR are instructive regarding approaches to balancing the rights and best interests of the child in relation to commissioning parents in ICS.

In dealing with a number of ICS cases which have come before them in order to regularise the parental relationship between children born through ICS and their commissioning parents, domestic courts in demand-side ICS states have largely focused on the welfare and best interests of the child as the factor to be given the most weight in balancing the competing rights and interests of the child and their commissioning parents. For example, in *X and Y (Foreign Surrogacy)*, the UK High Court held that the welfare of the child was of paramount importance in considering whether to make a parental order in favour of UK commissioning parents who commissioned twins through ICS in Ukraine.[168] This approach has been characteristic of the UK High Court in ICS cases since,[169] as well as in domestic ICS decisions of courts other jurisdictions which have dealt with applications concerning ICS, such as in Australia.[170] This highlights that the child's rights must be given precedence when competing with those of commissioning parents, in order to reach a balance that is consistent with the child's best interests.

In the ECtHR jurisdiction, in its first decision concerning ICS, *Mennesson v. France*, the ECtHR (Fifth Section, Chamber) reiterated that in determining whether a fair balance has been struck between the competing interests involved, "it must have regard to the essential principle according to which whenever the situation of a child is in issue, the best interests of that child are paramount".[171] Furthermore, the ECtHR emphasised "the importance to be given to the child's interests when weighing up the competing interests at stake".[172] Although the commissioning parents' and children's rights and interests were in direct conflict in this case, the ECtHR found that the twins (born through ICS in the USA) and their commissioning parents had experienced a range of impacts on their right to respect for family life as a result of the

168 *X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), at [24].

169 E.g. *Re L (A Minor)* [2010] EWHC 3146 at [9]-[10]; *Re X and Y (Children)* [2011] EWHC 3147 (Fam) at [40]; *Re C (A Child)* [2013] EWHC 2413 (Fam) at [30]ff; *Re WT* [2014] EWHC 1303 (Fam) at [38]ff; *R and S v T (Surrogacy: Service, Consent and Payments)* [2015] EWFC 22 at [42]; *A and B (No 2 – Parental Order)* [2015] EWHC 2080 (Fam) at [85]ff.

170 E.g. the Family Court of Australia in *Ellison v Karnchanit* [2012] Fam CA 602 was clear to point out that "irrespective of how State law views the applicant's actions, the children have done nothing wrong" (at [90]). The Court discusses the principle of the child's best interests throughout the judgment and applies this principle as central to its reasoning.

171 *Mennesson v. France*, Decision of 26 June 2014, Judgment (Merits and Just Satisfaction), Court (Fifth Section), App. No. 65192/11, at [81].

172 Ibid., at [101].

lack of recognition in French law of the legal parent-child relationship (thereby not recognising the twins as French citizens and not recognising the legal parent-child relationship lawfully established in the USA).[173] However, despite this, as the twins' were able to live in the care of their commissioning parents in France, and as it had not been impossible for them to overcome the practical obstacles arising from the lack of French recognition,[174] the ECtHR found no violation of their right to respect for family life.

However, the twins' right to respect for their private life had been violated. The ECtHR said that

> 'the effects of non-recognition in French law of the legal parent-child relationship between children thus conceived and the intended parents are not limited to the parents alone, who have chosen a particular method of assisted reproduction prohibited by the French authorities. They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard.'[175]

The ECtHR found the fact that the commissioning father was the twins' genetic father was of particular significance, as genetic parentage is an element of identity.[176] As such, "it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological [genetic] reality of that relationship has been established and the child and parent concerned demand full recognition thereof";[177] the uncertainty faced by the twins as to the possibility of being recognised as French nationals would likely have negative impacts on the "definition of their personal identity".[178] Overall, while the ECtHR said that there was "a serious restriction on the [twins'] identity and right to respect for private life"[179] amounting to a violation of their Article 8 ECHR right to respect for private life, there was no corresponding violation of their commissioning parent's rights.

In *Paradiso and Campanelli v. Italy*,[180] the ECtHR (Second Section, Chamber) again dealt with an application concerning ICS. Unlike in *Mennesson*, in this case, the commissioning parents, not the child born through ICS, were the applicants to the ECtHR (with the ECtHR finding they did not have standing

173 Ibid., at [87]-[89].
174 Ibid., [92].
175 Ibid., at [99].
176 Ibid., at [100].
177 Ibid.
178 Ibid., at [97].
179 Ibid., at [100].
180 *Paradiso and Campanelli v. Italy*, Decision of 27 January 2015, Judgment (Merits and Just Satisfaction) Court (Second Section), App. No. 25358/12.

to bring applications on behalf of the child[181]), and there was a clearer conflict of rights and interests between the commissioning parents and child. The child was born through ICS in Russia; the Italian authorities had refused to recognise his Russian birth certificate and register his birth in the Italian civil register. He had no genetic link to either commissioning parent,[182] (despite the applicants having intended a genetic link with the commissioning father[183]) and had remained in their care for his first six months of life, creating "*de facto* family life between the applicants and the child."[184] However, given these facts and the large amount of money paid by the applicants in relation to the ICS arrangement, the child was removed from the applicants and placed in state care,[185] with contact between the child and the applicants prohibited.[186] Like in *Mennesson*, the ECtHR stated that in considering whether a fair balance has been struck between the competing interests involved, "it must have regard to the essential principle according to which whenever the situation of a child is in issue, the best interests of that child are paramount".[187]

Ultimately, the ECtHR found a violation of Article 8 ECHR in relation to the action of the Italian authorities to remove the child from the applicants and place him in state care. The Article 8 violation rested on the ECtHR's view that the action was not proportionate, namely, the child's interests were not sufficiently taken into account by the Italian authorities.[188] In making this finding, the ECtHR noted with particular concern that "the child received a new identity on April 2013, which means that he had no official identity for more than two years. It is necessary, however, to ensure that a child is not disadvantaged on account of the fact that he or she was born to a surrogate mother, especially in terms of citizenship or identity, which are of crucial importance (see Article 7 of the United Nations Convention on the Rights of the Child)."[189]

Paradiso has been referred to the Grand Chamber; in this respect, it is important to highlight the joint partly dissenting opinion of Judges Raimondi and Spano. The dissenting judges found that there had been no violation of Article 8. They said the applicants' *de facto* family life was based on a tenuous link – without a genetic connection, and with possible illegal conduct underpinning *de facto* family life.[190] Moreover, they asserted "When the youth court decided to remove the child from the applicants, it took into account the harm that he would undoubtedly sustain but, given the short period that

181 Ibid., at [50].
182 Ibid., at [70].
183 Ibid., at [76]-[77].
184 Ibid., at [69].
185 Ibid., at [22]-[23].
186 Ibid., at [23].
187 Ibid., at at [75].
188 Ibid., at [81]-[87].
189 Ibid., at [85].
190 *Paradiso and Campanelli v. Italy*, *supra* note 181, joint partly dissenting opinion, at [3].

he had spent with them and his young age, it considered that the child would surmount this difficult stage in his life. Having regard to those factors, we have no grounds to doubt the adequacy of the elements on which the authorities relied in concluding that the child ought to be taken into the care of the social services. It follows that the Italian authorities acted in accordance with the law, with a view to preventing disorder and protecting the rights and health of the child, and maintained the fair balance that should be struck between the interests at stake."[191]

5 Balancing the Rights of the Surrogate with the Rights and Interests of the Commissioning Parents

Another nexus where competing rights and interests require balancing in ICS is when there is a conflict between the surrogate and the commissioning parents before the child is born. Despite the different views which exist concerning whether ICS amounts to commodification of women who act as surrogates,[192] commissioning parents are in part paying for a surrogate (who is sometimes also genetically related to the child) to carry and bring a child to term for them; this may lead to a power imbalance and raise conflicts over actions and decisions concerning the pregnancy and future child.

5.1 A power imbalance in favour of commissioning parents in ICS

Given that the commissioning parents are paying the surrogate to bring a child to term, to some extent the commissioning parents hold a concentration of power in the relationship. This may manifest in commissioning parents exerting pressure over the surrogate to act in accordance with their interests prior to and during pregnancy and post-birth. They may want the surrogate to undergo certain medical procedures or treatments whilst pregnant, or they may seek to dictate her lifestyle and wider health choices (such as her diet) during her pregnancy. The interests of commissioning parents can therefore impinge on the surrogate's rights to reproductive autonomy and bodily integrity. In instances where commissioning parents or one commissioning parent is genetically related to the child, this may also cause the commissioning parents to argue that they have certain rights regarding the child while he or she is in utero and following birth, based on this genetic link. They may use the

191 Ibid., at [12].

192 Strong arguments exist in this respect, see e.g. K. Schanbacher, 'India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women', (2014) 25 *Hastings Women's Law Journal* 21; and S. Reddy and T. Patel, '"There are many eggs in my body": Medical markets and commodified bodies in India', (2015) 26.3-4 *Global Bioethics* 218.

existence of this link to support their view that the surrogate should take or avoid particular actions during her pregnancy.

Another potential conflict which may arise is that the commissioning parents may seek to have a foetus terminated if prenatal testing indicates the child is likely to be born with a disability or serious health condition, or in instances where there is a multiple pregnancy and commissioning parents do not want a multiple birth. Another course of action commissioning parents might seek to take in such instances is that they may end up reneging on the ICS arrangement and abandoning the child following birth. An example of commissioning parents seeking an abortion arose in a domestic surrogacy in Canada. Prenatal testing detected the foetus (who was genetically related to the commissioning parents) would likely be born with Down Syndrome.[193] The surrogate initially refused abortion, but later acquiesced to the commissioning parents' request.[194] In this situation, the surrogate's acquiescence was likely triggered by a clause in the contract signed by the parties stating that if she made such a decision in the event that the commissioning parents sought abortion, the commissioning parents would be absolved from all responsibility in relation to the child.[195] Whether such a contractual clause is legally defensible is questionable, given that it arguably breaches rights safeguarded under both CEDAW and the CRC. Further, given the surrogate's own family situation, she was unable to entertain the prospect of raising the child herself.[196] As Baylis comments on this case, "The child is seen by the commissioning parents as a product, and in this case a substandard product because of a genetic condition".[197]

It is also important to recognise that the effect of the stance taken by the commissioning parents in this case reduced the surrogate to a commodified carrier, whose reproductive autonomy they sought to curtail based on the child's health status. Therefore, the surrogate's reproductive autonomy and right to health was arguably infringed, as her choice over whether to abort the child or continue the pregnancy appears to have been largely removed. Weighing the competing human rights and interests at stake, the surrogate's reproductive autonomy should not be completely subordinated to the views and wishes of the commissioning parents, but rather, should carry greater weight as the most vulnerable party (aside from the child) in comparison with the commissioning parents.[198] Galloway is correct in observing that here,

193 T. Blackwell, 'Couple urged surrogate mother to abort foetus because of defect', *National Post*, (6 October 2010), available at http://life.nationalpost.com/2010/10/06/couple-urged-surrogate-mother-to-abort-fetus-because-of-defect/

194 Ibid.

195 Ibid.

196 Ibid.

197 Ibid.

198 K. Galloway, 'Theoretical Approaches to Human Dignity, Human Rights and Surrogacy', in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015), at 28.

the surrogate has the least power and the most at stake regarding human dignity, and therefore a balancing of rights should weigh to protect her. However, it is true that in such situations if the surrogate's rights and interests were found to outweigh those of the commissioning parents, the question of who would care for the child would come into sharp focus, without a clear answer. This reality would be particularly difficult from a practical perspective if upon birth, the commissioning parents and the surrogate all refused to assume responsibility for the child. In such a situation, the child would be left completely vulnerable without any parental protection from the people directly responsible for bringing him or her into the world, inconsistent with their best interests and wider rights under the CRC (for example, to know and be cared for by their parents and to preserve their identity).

5.2 A power imbalance in favour of the surrogate in ICS

Conversely, a concentration of power may lie with the surrogate in ICS. This can stem from the position that in many jurisdictions, because she is the woman who carries and gives birth to the child, she is recognised as the child's legal mother. The case of *Paton v. United Kingdom*[199] highlights that in the context of abortion, the balance is usually struck in favour of pregnant women in instances when another party, for example the legal father of the unborn child (in ICS situations, this would more likely be the commissioning parents) opposes the abortion. In *Paton,* the then European Commission on Human Rights held that the legal father of an unborn child could not interfere with the decision of its mother to have an abortion if she chose to.[200] In dismissing the application made by the would-be father, the Commission said

> 'having regard to the right of the pregnant woman, [the Commission] does not find that the husband's and potential father's right to respect for his private and family life can be interpreted so widely as to embrace such procedural rights as claimed by the applicant, i.e. a right to be consulted, or a right to make applications, about an abortion which his wife intends to have performed on her.'[201]

The concentration of power with the surrogate is strongly rooted in the reality that she carries the child(ren) that the commissioning parents greatly desire to have and parent. As Baroness Hale observed regarding gestational parenthood in the case of *Re G (Children),*[202] the conceiving and bearing of a child "brings with it, in the vast majority of cases, a very special relationship

199 Ibid.
200 *Paton v. United Kingdom* (1980) 2 EHRR, at [26].
201 Ibid., at [27].
202 *Re G (Children)* [2006] UKHL 43.

between mother and child, a relationship which is different from any other."[203] Building on this notion, Mr Justice Baker asserted in the English ICS case of *D and L (Surrogacy)*[204] that "[T]he act of carrying and giving birth to a baby establishes a relationship with the child which is one of the most important relationships in life."[205] Indeed, in ICS the commissioning parents rely completely on the surrogate to bring the child to term and to relinquish the child to them upon birth. Given this, the surrogate may be able to make demands of the commissioning parents to take certain actions or provide her with certain things while she carries the child, and she may seek to make relinquishment of the child contingent upon certain demands being met.

Further, the surrogate might have particular views about actions relating to the child while in utero and once born. For example, she may want particular medical testing of the child in utero, as occurred in the case of *In the Matter of TT (a Minor)*[206] (domestic surrogacy), where commissioning parents opposed an amniocentesis as they feared it may detrimentally affect foetal health;[207] the surrogate proceeded with the test which led to a major breakdown in her relationship with the commissioning parents.[208] In instances of ICS where the pregnancy does not go as planned or if the surrogate has a disagreement with the commissioning parents, she may seek to terminate the pregnancy. Equally, the surrogate may refuse to terminate the pregnancy if she disagrees with the wishes of commissioning parents in instances where they seek termination. Given the fact that she carries the child within her body, the surrogate's reproductive autonomy and right to bodily integrity and health will, before the child's birth, carry more weight when balanced with the commissioning parents' interests in having the child, even in instances where the child is genetically related to one or both commissioning parents, or in instances where the child has no genetic link to the surrogate or the commissioning parents. This is because the surrogate's human rights as living, autonomous person will very likely outweigh the commissioning parents' interests relating to the potential future child that the surrogate carries within her body.

Before the child's birth through ICS, the greatest concentration of power arguably sits with the surrogate, in light of the fact that she may decide not to relinquish the child or children to the commissioning parents following birth. This is always a risk faced by commissioning parents in ICS, even if the parties have signed an agreement or contract stating that the child is to be provided to the commissioning parents following birth. The child is always in a position of risk in this respect, given the potential of the child being used

203 Ibid., at [34].
204 *D and L (Surrogacy)* [2012] EWHC 231 (Fam).
205 Ibid., at [25].
206 *In the Matter of TT (a Minor), supra* note 142.
207 Ibid., at [14].
208 Ibid.

as a bargaining chip or being caught in a custody battle in their first weeks and months of life, and even before birth.

5.3 Domestic jurisprudence relevant to the balancing of commissioning parents' and surrogates' rights and interests in ICS

Although many ICS arrangements occur without a conflict between the rights and interests of the surrogate and commissioning parents manifesting, some ICS cases heard in domestic courts to date illustrate that these issues can arise through ICS. Some further judicial decisions concerning domestic surrogacy arrangements are also worth highlighting in relation to the balancing of rights and interests between commissioning parents and surrogates in ICS. These decisions show that following a child's birth, the balance between the surrogate's and commissioning parents' competing rights and interests will shift in ICS, with the existence of the child meaning the best interests of the child must become the paramount consideration in striking the balance between the rights and interests of these parties.

In *Re W and B and H (Child abduction: surrogacy) (No. 2),*[209] the UK High Court dealt with the breakdown of an ICS arrangement between a British surrogate (no genetic link) and US commissioning parents. The surrogate changed her mind about the arrangement and left the US, returning to the UK where she gave birth to twins, refusing to provide them to the commissioning parents. This case is significant as it shows that despite the reality that in ICS surrogates are not usually genetically related to the child or children they carry, this does not necessarily mean surrogates always relinquish children following birth. The UK High Court held the twins should be returned to the US where the commissioning parents lived, and where it had always been intended the children would live and grow up. Moreover, they were genetically related to their commissioning father. Therefore, the intention of the commissioning parents, and the genetic link to the commissioning father were factors outweighing the surrogate's wish to retain the children in her care. Similarly, in the case of *Re N (a Child)*[210] concerning a domestic surrogacy situation, the UK Court of Appeal said the central question to be addressed was which one of the two possible residential upbringings available to the child – with the commissioning parents, or with the surrogate and her husband – would deliver the best outcomes for the child and be most beneficial to him, where he would be "most likely to mature into a happy and balanced adult and to achieve his fullest potential as a human".[211] Therefore, the child's best interests were the central arbiter, not the rights and interests of the adult parties.

209 *In the Matter of W and W v H (Child Abduction: Surrogacy) (No 2)*, [2002] 2 FLR 252.
210 *Re N (a Child)*, [2007] EWCA Civ 1053.
211 Ibid., at [12].

Two landmark US cases in which surrogates have failed to relinquish a child to commissioning parents require brief mention. *In the Matter of Baby M*, the New Jersey Supreme Court held that on the basis of the child's best interests, custody of the child should go to the commissioning parents.[212] However, the Court noted with concern that the surrogate's interests were largely subordinated to the interests of those it viewed as being in control of the commercial surrogacy transaction, namely the commissioning parents.[213] In the later case of *Johnson v Calvert,* the Supreme Court of California held that in the case of a gestational surrogate who refused to surrender the child to the commissioning parents, the intent of the parties had to be assessed in order to balance rights and interests appropriately. As the Court said regarding the commissioning parents, "But for their acted-on intention, the child would not exist",[214] and if the surrogate had manifested her own intent to be the child's mother after birth, she would not have been used as a surrogate.[215] Therefore, quite a different approach can be said to be taken by the US courts when it considers situations such as these, in contrast to the UK judgment *In the Matter of TT (A Minor*) (previously discussed in section 4.5.1). In *TT,* the Court, in finding the child should remain with the surrogate who refused to relinquish the child, placed its full focus on the rights and best interests of the child. It is implicit, however, in the *TT* ruling that the child had already formed an attachment to the surrogate mother, that the surrogate had also formed an attachment to the child. Therefore, the Court found that the surrogate's rights and interests outweighed those of the commissioning parents, and that her interests aligned with the child's best interests. Furthermore, the Court in *TT* found that the surrogate mother would be better able to fulfil the child's needs and interests when balanced against what the commissioning parents would be able to provide.[216]

5.4 The surrogates' right not to be exploited through ICS

Considering the balancing of rights and interests between the surrogate and commissioning parents, the rights and interests of the surrogate not to be exploited through ICS (including respect for her right to health and reproductive autonomy), must be weighed against the interests of the commissioning parents in having a child. For example, it is arguable that the Indian practice of implanting up to five embryos at one time into a surrogate (in many states,

212 *In the Matter of Baby M*, 537 A.2d 1227 (N.J. 1988).
213 Ibid., at [276]-[280].
214 *Johnson v Calvert,* S023721, 5 Cal. 4th 84 (1993), at 13.
215 Ibid., at [10].
216 *In the Matter of TT (a Minor), supra* note 142, at [70].

embryo implantation is limited to one per time)[217] to increase the chances of conception through ICS to meet the desires of commissioning parents and 'guarantee' a child is exploitative.[218] The outcome of such a large number of embryos being implanted is a higher likelihood of multiple births, which can increase medical risks to mother and child.[219] However, it may be the case that Indian surrogates do not know, or are not routinely informed that this is a potential outcome of multiple embryo implantation.[220] Even in instances where surrogates are made aware of this practice and provide their consent in an ICS setting, it arguably still amounts to exploitation of the surrogate given the health risks it exposes her to.

A balancing of rights and interests may also come into play when the surrogate's life is endangered because of an ICS pregnancy. In such cases, a rights-based approach requires that the surrogate must have the ultimate say in whether she wants to terminate the pregnancy, in order to protect her own life. This is because she is a living human being and her rights and human dignity must be protected, despite the existence of the unborn child she carries and the interests of the commissioning parents in ensuring that child is born. In such situations, commissioning parents – whose main interest is in the survival of the child – may seek to prevent the surrogate from exercising such a choice. Such actions would arguably lead to a breach of the surrogate's right to health and reproductive autonomy.

6 Conclusion: Overall balancing of rights in ICS

6.1 A general approach to rights balancing in ICS according priority to the child's rights and best interests

Bainham makes the following observation which can be applied to the ICS context:

> 'It is quite impossible to evaluate the claims of children without considering their interaction with the claims of others, whether parents or others in the community. The very notion of children possessing rights implies the existence of legal or moral

217 H. Brenhouse, 'India's Rent-a-Womb Industry Faces New Restrictions', *Time,* June 5, 2010, available at http://www.time.com/time/world/article/0,8599,1993665,00.html

218 Ibid. Indeed, under s.23(2) of the Draft Assisted Reproductive Technologies (Regulation) Bill 2010, it is stipulated that the number of embryos allowed to legally be implanted will be limited by regulations under the Bill.

219 P. Singer and H. Khuse (eds.), *Bioethics: An Anthology* (2nd ed.), (2006), at 86.

220 W. Chavkin and J. Maher (eds.), *The Globalization of Motherhood: Deconstructions and Reconstructions of Biology and Care*, (2010), at 11.

> duties in *someone*, or indeed everyone, and this raises immediately the issue of the interests of the adult world which can often clash with children's interests.'[221]

This paper has highlighted the various friction points in ICS which may necessitate a balancing of competing rights and interests. Key decision-makers in ICS such as social workers, medical professionals, government decision-makers and judges will need to undertake rights balancing exercises on a case-by-case basis, considering the particular facts involved. Rights balancing exercises may be required at numerous points in time, in order to decide the appropriate course of action in relation to the child's rights and best interests *vis-à-vis* the core adult parties to the ICS arrangement. It is due to the nature of ICS as a method of family formation involving multiple potential parents, and the reality that rights and interests will potentially conflict throughout the course of ICS arrangements (prior to conception and pregnancy; during pregnancy; post-birth), that rights balancing will always be required in ICS situations.

What is apparent from the discussion presented in this paper, including in particular, much of the jurisprudence from the ECtHR and domestic courts discussed, is that where a child is concerned – as is the case in all ICS situations – the rights and interests of that child, once they are born, should be accorded the most weight in balancing competing interests. This is due to the child's vulnerable position in comparison to the other core parties to ICS, and the child's need for protection in order for their rights and interests to be given effect. The child is the one core party in ICS arrangements who can definitively be said to have come to the situation without any underlying motivation. Children born through ICS do not choose to be born through ICS. On the other hand, commissioning parents are motivated to instigate ICS arrangements by their desire for a child; if it was not for commissioning parents, there would be no ICS arrangement. The surrogate also generally makes a choice to become involved in the ICS arrangement, perhaps motivated by a desire to help others or by the potential for monetary gain.

Unlike the core adult parties to ICS arrangements, the child cannot protect or advocate for their own rights and interests. However, the rights and principles established by the CRC have near universal endorsement from states, including the best interests of the child principle. Taking an approach to rights balancing in ICS which places priority on the child's rights and best interests is not only consistent with the CRC, but arguably required pursuant to the best interests of the child principle. Placing priority on the child's rights in the balancing of rights and interests in ICS will help to ensure that actions and decisions taken in the course of these arrangements will have a positive impact on the child's situation, consistent with their rights and best interests, both in the immediate short-term in their infancy, as well as into the future as they grow up.

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221 Bainham, *supra* note 6, at 98.

Therefore, in terms of rights balancing in ICS, the below approach succinctly captured by Bainham is appropriate in ICS:

> 'Increasingly, it is likely that the trend will be to admit the co-existence of independent rights and interests for children and parents whilst emphasising the *primacy* of the rights and interests of children.'[222]

Importantly however, as has also been illustrated through the discussion in this paper, Bainham notes that this approach should not presuppose that children's interests should always necessarily be given precedence over adult interests. He says there should be an assessment of which rights and interests should be regarded as more significant or serious, and they might be designated as the primary rights and interests, therefore to be accorded priority.[223] In the ICS context, this means according priority to the child's rights to preserve their identity, to health, to know and be cared for by their parents as far as possible, to grow up in a family environment, and to be free from discrimination and any form of abuse or exploitation. Taking such an approach is also consistent with the non-exhaustive, non-hierarchical list of elements suggested by the Committee on the Rights of the Child that "could be included in a best interests assessment by any decision-maker having to determine a child's best interests."[224] The Committee says that determining the child's best interests must be aimed at ensuring the full and effective enjoyment of CRC rights and the holistic development of the child;[225] it is also important to recognise the evolving capacities of the child, and that "decisions should assess continuity and stability of the child's present and future situation."[226] As Gerards further observes, in conflicts between fundamental individual rights (such as those safeguarded by the ECHR) and other individual interests, often more weight will be placed on the fundamental right, despite the importance of the other competing interests.[227] Gerards herself notes such a distinction is essentially artificial.[228] Therefore, it may well be that in many ICS situations, such an exploration of competing rights and interests will lead to the child's rights and best interests being accorded priority in reaching an appropriate balance. But they must first be viewed and balanced on a case-by-case basis against the rights and legitimate interests of the commissioning parents and particular-

222 Ibid., 124.
223 Ibid.
224 UN Committee on the Rights of the Child, *supra* note 7, at [50]. The elements included by the Committee are: the child's views; the child's identity; preservation of the family environment and maintaining family relations; care, protection and safety of the child; situation of vulnerability; the child's right to health; and the child's right to education. See [52]-[79].
225 Ibid., at 82.
226 Ibid., [84].
227 J.H. Gerards, 'Fundamental Rights and Other Interests: Should it Really Make a Difference?', in E. Brems (ed.), *Conflicts between Fundamental Rights*, (2008), 680 at 688.
228 Ibid., 690.

ly the surrogate mother, whose rights and interests may in some cases be accorded priority.

6.2 Striking an overall balance in the four situations of competing rights and interests in ICS discussed in this paper

While acknowledging that rights balancing must occur on a case-by-case basis in each individual ICS situation, addressing the particular circumstances and facts involved, some final comments can be made concerning the possible balance to be struck in the four situations of competing rights and interests discussed in this paper. These final comments are made bearing in mind the general approach outlined in section 6.1, of taking the child's rights and best interests as the key arbiter in ICS rights balancing.

Where genetic donor parents' privacy rights and children's identity and health rights conflict in ICS, the balance should weigh in favour of protecting the child's rights. This is consistent with the best interests of the child given the likely positive lifetime impact of preserving the child's identity and health rights, as has been recognised by the Committee on the Rights of the Child and reflected in the broad international consensus concerning past experiences of anonymous donor conception. It is thus important that these rights of the child (Article 8 and 24 CRC rights) are accorded priority and significant weight in the balancing of competing rights and interests between ICS genetic donor parents and children born through ICS. Moreover, there is a strong argument that in becoming an ICS genetic donor parent, donors cede their privacy right to maintaining their anonymity in relation to their genetic offspring born through ICS. This is due to the choice that ICS genetic donor parents make to contribute their genetic material to creating a child with whom they will share a genetic link, and who is entitled to exercise and enjoy their rights and have their best interests protected.

It is also clear that although a decision to try to become a parent and found a family is one which must be respected and those who make it treated without discrimination, no absolute right to a child or to become a parent exists under international human rights law. Therefore, the rights and interests of commissioning parents in ICS cannot be held to automatically outweigh those of the children conceived and born through ICS resulting from their desires, decisions and actions. It must also be remembered that all ICS arrangements are based on the choice and intention of commissioning parents to have a child through ICS, and that they have a responsibility under Article 18(1) CRC to treat the best interests of the child as their basic concern. As such, when making decisions and taking actions in ICS that will affect the child or the future child once he or she is born, commissioning parents should ensure that the child's actual or future best interests guide any decision that will affect him or her. However, in ICS, commissioning parents will not always act in the child's best

interests and consistent with the child's rights. In instances where the commissioning parents' interests do not coincide with the child's rights and best interests, it is the child's rights and best interests which must be the paramount consideration in balancing a conflict of rights and interests with those of their commissioning parents. For example, even in situations where one or both commissioning parents share a genetic link with the child, if there are factors weighing negatively against the commissioning parents regarding protection of the child's rights and best interests – such as if safety and welfare concerns exist regarding the care and family environment the commissioning parents will provide – the child's rights and best interests must be the determining factor, outweighing the rights and interests of the commissioning parents.

In situations concerning unborn children in ICS, the rights and interests of the surrogate mother should, however, be accorded precedence when balanced against those of the potential future child and the commissioning parents, in order to ensure her rights to health – including reproductive autonomy – and life are not violated. Whilst the rights and best interests of the future child must be considered, along with respect for the interests of the commissioning parents (such as their desire for a child), in balancing the rights and interests of future children and commissioning parents against those of the surrogate in ICS, they should not be accorded greater weight in situations where the surrogate's rights and interests are at risk. In such situations, the protection of the surrogate's health and life must outweigh the other rights and interests at stake, especially in contrast to the child in-utero, who does not fully attract human rights until birth.

Despite this, in situations where the pregnant surrogate engages in actions or decisions unnecessarily endangering the foetus and therefore, the potential future child (that is, without a medical reason necessitating her action or decision), the balance is likely to switch in favour of the commissioning parents and future child. Appointing a guardian representing the unborn future child is a mechanism which could usefully give voice to the future child and ensure their rights and best interests are inserted into any rights balancing exercise in ICS.[229] Once a child is born through ICS, in instances where there is a conflict of rights and interests between the surrogate and commissioning parents, the child's rights and best interests must be treated as the paramount concern. Again, it is likely that ensuring the involvement of a guardian representing the child's rights and best interests in ICS following the child's birth could be a mechanism with a protective effect for the child, especially in instances where there is a conflict of rights and interests between any of the parties.[230]

Any rights balancing exercise in ICS requires contending with a complex web of intertwined and overlapping competing rights and interests. However,

229 Achmad, *supra* note 3, at 164-165 of this thesis.
230 Ibid., at 165 of this thesis.

there is always a child at the centre of ICS arrangements. Despite the competing rights of core parties to ICS, all actions and decisions in ICS must be guided by the principle of human dignity, and wherever possible uphold and protect the child's rights and ensure that the child's best interests are the key arbiter. By focusing on the vulnerability of the child and other core parties where appropriate and striking a balance to achieve decisions and take actions that best serve the child both presently and into the future, it is likely that this will lead to outcomes best serving all core parties to ICS in the long-term.

11 Conclusion

1 Focusing on child rights in international commercial surrogacy

International Commercial Surrogacy is one of the most complex ways to build a family with children. It is a site of social practice at which profound ethical, moral, philosophical and legal questions converge. As such, ICS has emerged as a 21st century human rights challenge. ICS continues around the world in the absence of international agreement concerning the practice from ethical, moral and legal perspectives. It is crucial to acknowledge that ICS as it is currently practised does not place children at the centre of these arrangements, and their rights are often left unprotected in practice.

This doctoral study is the first study to place a comprehensive focus on the children's rights most at risk in ICS, and to do so through a child rights approach under public international human rights law. By focusing on the rights of the child most at risk in ICS, and presenting recommendations for the implementation of the United Nations Convention on the Rights of the Child (CRC) so it can have a holistic, protective effect for children in ICS, this study makes a novel scientific contribution to both international child rights legal scholarship and to international child rights practice. It deepens the focus on children and their rights in ICS, and progresses approaches for the protection of children in ICS, grounded in the standards and norms established by the CRC and other relevant sources of public international human rights law.

Over the course of this study being undertaken[1] and the course of time through which the articles which make up this thesis have been written – and in most cases, published – the practice of ICS has both evolved and functioned in a state of flux. At times, this has posed a challenge for research, given the rapid rate of change occurring world-wide. However, this study has remained dynamic and responsive over the time it has been researched and written, and the findings and recommendations have had and can continue having practical, real-world application, to help improve the contemporary situation of children's rights in ICS internationally. Already, throughout the course of this study being undertaken, its research and findings have at various stages been presented to and taken into consideration by various decision-making

1 Primarily undertaken between 01 January 2012 and 31 July 2016.

bodies developing national and international approaches to ICS.[2] The continuing relevance of this study is underscored by the author's involvement as a member of the Core Expert Group convened by International Social Service to develop and draft 'Principles for better protection of children's rights in the context of international surrogacy'.[3] Moreover, given the ongoing nature of work regarding international surrogacy amongst international fora and at the domestic level, this doctoral study is timely.

2 International Commercial Surrogacy: A complex method of family building in a changing landscape

The ICS landscape has changed over the course of this study in many respects. This has especially been the case in the less-developed states where ICS supply has emerged over the past decade, which this study has largely been concerned with in relation to the child rights challenges arising. For example, the period during which this study has been undertaken has witnessed the rise of India as a global ICS giant where the ICS market has been allowed to grow rapidly, unregulated, and without any governing legislation.[4] Yet more recently, the Indian government has taken measures aimed at significantly limiting the practice and availability of ICS in India.[5] Also during the course of this study,

2 E.g. the Parliament of Australia House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements (2015); the Staatscommissie herijking ouderschap (Dutch Government Committee on the Reassessment of Parenthood); and the Hague Conference on Private International Law Parentage/Surrogacy project.

3 See: International Social Service, *Call for Action 2016: Urgent need for regulation of international surrogacy and artificial reproductive technologies,* January 2016, available at: http://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy (accessed 29 July 2016).

4 The Assisted Reproductive Technology Bill 2008 has been on the Indian parliamentary agenda for nine years but has not been adopted. The Bill has now been reframed as the Surrogacy (Regulation) Bill 2016, and seeks to establish a complete ban on commercial surrogacy in India, meaning foreign citizens will not be able to access ICS in India and Indian citizens will only be able to undertake altruistic surrogacy in India. See A. Tandon, "Rent-a-womb may well become illegal", *The Tribune,* 2 July 2016, available at: http://www.tribuneindia.com/news/nation/rent-a-womb-may-well-become-illegal/260012.html (accessed 29 July 2016). For a helpful overview of the ICS situation in India up until 2015, see N. Witzleb and A.Chawla, "Surrogacy in India: Strong Demand, Weak Laws", in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights,* (2015), 167-192. For discussion of developments in India concerning ICS 2015-2016, see S. Kusum, "Public interest litigation PIL challenging commercial, overseas, same sex, single surrogacy in India – contemporary legal judicial developments" (2016), available at http://www.familiesthrusurrogacy.com/wp-content/uploads/2016/05/Indian-Surrogacy-Bill-Background-latest-developments.pdf (accessed 29 July 2016).

5 The most significant measure has been the directive issued in November 2015 by the Indian Ministry of Home Affairs stating that foreign nationals are not allowed to commission surrogacy in India. See http://boi.gov.in/content/surrogacy (accessed 29 July 2016) and

other international supply-side hubs proffering ICS markets have subsequently taken steps to close down the practice within national borders. Thailand is the prime example in this respect, where legislation was passed in 2015 outlawing and criminalising ICS in the country.[6]

Despite this somewhat boom-and-bust nature of the ICS market in some states, another development observed over the course of this doctoral study is the dynamic nature of the global ICS market to continue catering to commissioning parents' ongoing demand for ICS. This is largely based on the actors behind the ICS industry – such as surrogacy clinics, companies and brokers, and medical professionals – remaining agile and responsive to maximise this demand and meet it with ICS supply.[7] In an effort to sustain ICS practice, this responsiveness has been evident in the way these actors have taken advantage of loopholes and gaps in domestic laws and the vacuum persisting at the international level concerning ICS. For example, in response to the Indian government's initial steps to restrict ICS supply,[8] the ICS industry developed a workaround to ensure demand from unmarried and same-sex couples did not go unmet. This involved Indian women who were acting as surrogates crossing the border to Nepal,[9] where (at that time) although acting as a surro-

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Ministry of Health and Family Welfare, "Commissioning of surrogacy – instructions regarding", 4 November 2016, available at: http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf (accessed 29 July 2016). For discussion, see A. Rabinowitz, "The trouble with renting a womb", *The Guardian,* 28 April 2016, available at: https://www.theguardian.com/lifeandstyle/2016/apr/28/paying-for-baby-trouble-with-renting-womb-india (accessed 29 July 2016). Also N.B. the Surrogacy (Regulation) Bill 2016, which would outlaw all commercial surrogacy in India; however, although this Bill was introduced in the Lok Sabha on 21 November 2016, this Bill has not yet been officially passed into law. Consistent with the Bill, the Indian Government is reported to have stated in an affidavit to the Indian Supreme Court in March 2017 that it does not support commercial surrogacy in India. See: "No commercial surrogacy, only for needy Indian couples, Government tells SC", *The Indian Express,* 06 March 2017, http://indianexpress.com/article/india/india-news-india/govt-to-make-commercial-surrogacy-illegal-panel-to-decide-on-cases-of-infertile-couples/

6 Protection of Children Born from Assisted Reproductive Technologies Act 2015. The law came into effect in July 2015.

7 This aspect of the practice of ICS is the subject of social and cultural anthropology doctoral research currently being undertaken by Elo Luik, University of Oxford. Luik's research explores how ICS is responding to attempts to regulate it, and the specific role of intermediaries facilitating ICS.

8 The Indian Ministry of Home Affairs did so by issuing a directive restricting ICS in India to foreign married (heterosexual) couples, and requiring foreign citizens seeking ICS in India to apply for medical visas, supported by a letter from their home government that the country recognises surrogacy and that any children born will be permitted entry to that country. See: Ministry of Home Affairs (India), File No.25022/74/2011-F-1. The text of this directive is available at: http://blog.indiansurrogacylaw.com/india-clarifies-stand-surrogacy-visa-regulation/ (accessed 29 July 2016).

9 J. Drennan, "The Future of Wombs for Rent", *Foreign Policy,* 2 March 2015, available at: http://foreignpolicy.com/2015/03/02/the-future-of-wombs-for-rent/ (accessed 29 July 2016).

gate was deemed an illegal activity for Nepali women, it remained legal for foreign women to act as surrogates within Nepal.[10] Although this meant same-sex couples could initially continue accessing ICS largely on the same basis they would have in India, concern arose regarding the situation of both the surrogates involved and the children born as a result. After some time, the Nepali Supreme Court ruled that ICS should not continue to be undertaken in Nepal; a Cabinet decision to completely ban the practice was adopted in September 2015.[11]

However, ICS supply continues springing up in new places, in response to measures to tighten or ban ICS in some of the less-developed supply-side states. For example, currently a new ICS market has been developing in Cambodia, largely as a result of some Thai and Indian ICS operations relocating there to take advantage of the unclear legal regime governing the practice of surrogacy in Cambodia.[12] Meanwhile, other states such as Georgia continue to quietly cater to the demand of commissioning parents for children through ICS in a largely under-the-radar manner. However, the spotlight is beginning to turn on these ICS supply states, and they will not be able to avoid scrutiny much longer.[13]

Therefore, although the ICS market remains fragile in some ways, in others it continues to thrive and recalibrate, demonstrating its adaptability to new circumstances. This is despite the increased attention from international media over the period this study has taken place, to expose situations of ICS 'gone

10 As discussed in the UK High Court Family Division case *Re X (Foreign Surrogacy: Child's Name)* [2016] EWHC 1068 (Fam), at [20].

11 See Embassy of the United States, Kathmandu Nepal, "Surrogacy services are banned in Nepal", available at: http://nepal.usembassy.gov/service/surrogacy-in-nepal.html (accessed 29 July 2016). For discussion, see R. Abrams, "Nepal Bans Surrogacy, Leaving Couples With Few Low-Cost Options", *The New York Times*, 2 May 2016, available at: http://www.nytimes.com/2016/05/03/world/asia/nepal-bans-surrogacy-leaving-couples-with-few-low-cost-options.html?_r=0 (accessed 29 July 2016).

12 N. Bhowmick, "After Nepal, Indian surrogacy clinics move to Cambodia", *Al Jazeera*, 28 June 2016, available at: http://www.aljazeera.com/indepth/features/2016/06/nepal-indian-surrogacy-clinics-move-cambodia-160614112517994.html (accessed 29 July 2016). The development of the ICS market in Cambodia has not been without controversy. See B. Sengkong and W. Jackson, "As surrogacy industry expands, legal and ethical issues mulled", *The Phnom Penh Post*, 23 June 2016, available at: http://www.phnompenhpost.com/national/surrogacy-industry-expands-legal-and-ethical-issues-mulled (accessed 29 July 2016).

13 E.g. see *End of mission statement of the United Nations Special Rapporteur on the sale of children, child prostitution and child pornography, Maud de Boer-Buquicchio, on her visit to Georgia*, 18 April 2016, in which the Special Rapporteur highlighted comprehensive concerns about the practice of ICS in Georgia, in particular the protection gap surrounding children created through ICS in Georgia and that this places children at risk of being exploited, having their rights and best interests violated.

wrong'. The strongest example of this was the case of baby Gammy in 2014.[14] Gammy was born with Down Syndrome as a twin to his Thai surrogate mother and abandoned in Thailand by his Australian commissioning parents, who returned to Australia with Gammy's twin sister, Pipah. Furthermore, it later came to light that Gammy and Pipah's commissioning father was a convicted child sex offender. Regardless of the international outcry this case engendered, Australia reportedly continues to have the largest number of ICS users (commissioning parents) per capita.[15]

Increased public awareness of the practice of ICS has meant this is a social phenomenon which has gone from relative obscurity to dinner-table discussion in some countries, especially those which are involved in ICS from the supply and demand perspectives and which have been embroiled in ICS controversies as a result. ICS is also now the subject of much legal scholarship and research.[16] However, despite there now being increased attention from scholars towards the child's situation in ICS within this body of scholarship, scholarship focusing closely on the rights of the child from a public international human rights law perspective remains fairly limited.

Furthermore, over the course of this study, government decision-makers and courts in both ICS supply and demand states have been increasingly contending with the challenges and problems arising from the practice, and intervening to resolve ICS situations on a case-by-case basis. In the last three years, as well as steps taken by some supply-side states to tighten their approaches to ICS, some demand-side states have begun explicitly recognising ICS as a human rights challenge with implications for their citizens and residents and for the operation of their national laws and policies. Examples of this are the national inquiries undertaken in The Netherlands[17] and Austra-

14 The judgment of the Family Court of Western Australia in this matter provides a comprehensive overview of the facts of this case. See: *Farnell & Anor and Chanbua* [2016] FCWA 17, at 8-40. For commentary, see: C. Achmad, "When baby comes last", *The Dominion Post,* 12 August 2014, A7; S. Howard, "Taming the international commercial surrogacy industry", *British Medical Journal,* 23 October 2014, 349.

15 M. Cooper et al (eds.), *Current Issues and Emerging Trends in Medical Tourism,* (2015) at 147.

16 E.g. P. Gerber and O'Byrne, K., *Surrogacy, Law and Human Rights* (2015); Koffeman, N., *Morally Sensitive Issues and Cross-Border Movement in the European Union: The cases of reproductive matters and recognition of same-sex relationships* (2015); Van Beers, B., 'Is Europe 'Giving in to Baby Markets?': Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets', 23:1 *Medical Law Review* (2015), 103-134; Wells-Greco, M., *Status of Children Arising from Inter-country Surrogacy Arrangements* (2016).

17 Staatscommissie herijking ouderschap, established 2014. The Statscommissie reported in December 2016. See *Rapport van de Staatscommissie Herijking ouderschap, Kind en ouders in de 21ste eeuw,* 7 December 2016.

lia[18] concerning ICS, which may lead to new legislative or policy approaches being developed.

At the international level too, ICS is receiving increased recognition as a global problem which must be addressed at the international level, if those it makes vulnerable are to be comprehensively protected. Since 2010, international discussion and work on international surrogacy (including ICS) has been undertaken through the Hague Conference on Private International Law.[19] This work has gradually increased over the past three years in particular, to the point where an international 'Experts' Group on Parentage/Surrogacy' has now been convened, and is discharging a mandate to "explore the feasibility of advancing work on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements."[20] Meanwhile, in the public international law arena, during the course of this study being undertaken the Committee on the Rights of the Child has taken its first steps towards recognising ICS as a child rights challenge and indicating it is on its agenda as a problem in children's rights. Over the past three years, the Committee has made its first comments on the practice of ICS and expressed concern regarding the rights and best interests of children conceived and born as a result of ICS arrangements.[21] These international efforts to contend with and address some of the challenges posed by ICS are now further complemented by the aforementioned international project being undertaken by International Social Service (ISS) and a global group of multidisciplinary experts, to develop principles to protect children in international surrogacy;[22] the author of this doctoral study is a member of the Core Expert Group leading the drafting of these principles with ISS.

18 Australian House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements, established 2015. The Inquiry reported in May 2016. See: *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements,* tabled 4 May 2016.

19 See: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (accessed 29 July 2016).

20 Conclusions and Recommendations of the Council on General Affairs and Policy of the Hague Conference of March 2015, at [5]. The reports of the Expert's Group are available at: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (accessed 29 July 2016).

21 In its Concluding observations on the second to fourth periodic reports of Israel, (2013), CRC/C/ISR/CO/2-4, at [33]-[34]; and Concluding observations on the consolidated third and fourth periodic reports of India, (2014), CRC/C/IND/CO/3-4, at [57](d) and [58](d).

22 See Section 1 of this Chapter and for updates on the recent work of the Group, see: http://www.iss-ssi.org/index.php/en/news1/227-iss-surrogacy-drafting-principles and http://www.dsg.univr.it/documenti/Iniziativa/dall/dall983502.pdf

3 A CHILD ALWAYS AT THE CENTRE, BUT OFTEN UNPROTECTED

Despite the changing landscape of the practice of ICS over the course of this study being undertaken, a feature which has remained constant is that ICS arrangements exist to create children, and in doing so, in some instances ICS endangers the rights and best interests of children conceived and born as a result. Indeed, this has been reflected in the caseload of domestic courts and in the regional sphere, the European Court of Human Rights, of matters concerning ICS arrangements and associated implications for children's rights and best interests. Blyth, in his study of the welfare of children conceived through new reproductive technologies, asks "Can bringing children into the world ever be regarded as contrary to their interests?"[23] Although this thesis has not considered this question, it has shown that as new children deliberately brought into existence deliberately through ICS, they can face particular challenges to their rights and best interests, heightening their vulnerability. As a result, and remembering that "in a contemporary context, [the concept of human] dignity underpins the human rights framework",[24] if safeguards to protect their rights and best interests are not established and implemented, ICS presents an affront to the human dignity of children born this way. Therefore, this study has made the case for children conceived and born through ICS as the most vulnerable party to ICS arrangements, and who must be better protected throughout this practice, to ensure their rights and best interests are upheld and given effect to.

The challenge of dealing with situations of ICS is made more complex by the lack of an international regulatory regime governing the practice, the lack of international agreement on how to approach the practice, and the variation amongst national legislation and policy concerning ICS. This can lead to conflict of laws situations when national laws of multiple states are applied to any one ICS arrangement, with no common legal approach between states and no international regime to specifically guide and regulate the practice of ICS. As Chief Justice Susan Denham observed in a landmark surrogacy ruling in the Irish Supreme Court in November 2014, "Any law on surrogacy affects the status and rights of persons, especially children: it creates complex relationships and has a deep social content."[25] Arguably it is because of this effect and the tensions involved in arriving at such laws, that we are left with the unsatisfactory position in many domestic jurisdictions that there is simply no law or policy clarifying the national position on the practice of ICS specifically.

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23 E. Blyth, "To Be or Not to Be? A Critical Appraisal of the Welfare of Children Conceived Through New Reproductive Technologies", *International Journal of Children's Rights*, (2008), 16(4), at 506.

24 K. Galloway, "Theoretical Approaches to Human Dignity, Human Rights and Surrogacy", in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights*, (2015), at 25.

25 *M.R. and D.R. (suing by their father and next friend O.R.) & ors v An t-Ard-Chláraitheoir & ors* [2014] IESC 60 (7 November 2014), at [113].

Despite this, the challenges to the rights of children conceived and born through ICS persist and require attention.

4 A focus on the child, the most vulnerable person in International Commercial Surrogacy arrangements

Given that ICS is a practice which has emerged and is continuing as a modern method of family formation, this thesis has traversed the most pressing child rights challenges faced by children conceived and born through ICS, such as the risks to their rights to nationality and identity preservation. In doing so, it has proven the hypothesis that children are particularly vulnerable to having their rights endangered by being conceived and born through ICS, especially given the lack of international agreement on and regulation of ICS, and a lack of concerted efforts to uphold the standards and norms of the CRC in ICS arrangements. This study has shown that in general, the fact that the child is often the person in ICS whose rights are most at risk is due to:

- The child's lack of personal agency to advocate for his or her own rights and interests (especially in infancy and early years), and that by the time they can exercise this agency, actions and decisions will have been taken by the adults involved that might have undercut the child's ability to exercise and enjoy some of his or her CRC rights;
- The child's ambiguous legal status when born in many situations of ICS;
- The involvement of multiple parties with potential claims to parenthood in relation to the child and a lack of clear and certain legal parentage;
- The child's birth in a state different to the one that the commissioning parents intend to reside and raise the child in; and
- The overall uncertainty of the child's situation when born through ICS.

By exploring the situation of the child in ICS through a child rights perspective under public international human rights law, this study has placed necessary and comprehensive focus on the child, advanced understanding of the child's rights situation in ICS, and contributed to filling a gap in scholarship. This has been achieved whilst clearly acknowledging throughout the study the existence and importance of the rights and interests of other parties to ICS arrangements, and highlighting these where appropriate in relation to the child's situation. In particular, the human rights situation of surrogate mothers in ICS remains fraught; as SAMA observes, "The entry into surrogacy ushers the surrogates into a process full of challenges and difficulties."[26] Although placing central focus on the child, by remaining conscious of the wider human rights picture in ICS, this study is complementary to scholarship addressing the rights of other parties involved in ICS, such as surrogate mothers.

26 SAMA, *Birthing a Market: A Study on Commercial Surrogacy,* (2012), at 60.

5 A MULTIFACETED CHILD RIGHTS CHALLENGE

This study has shown that the challenge to the rights of children conceived and born through ICS is multifaceted in nature. Chapters Two to Four illustrated that the child's rights and best interests are at risk in a number of ways in ICS and that these rights intersect with the situation, rights and interests of the other core parties to ICS, namely surrogate mothers, commissioning parents and genetic donor parents. Chapter Four demonstrated this complexity through a close examination of the child and their multiple 'mothers' in ICS, giving insight into the fragmented parentage[27] often present in ICS and the problems this can trigger for children born through ICS.

Chapters Five to Eight then built on this contextual underpinning of the study, by presenting a comprehensive picture of the child's rights most at risk when conceived and born through ICS. Chapter Five developed the idea of the child as the central locus of vulnerability in ICS, and assessed jurisprudential trends and non-judicial responses to the contemporary challenge of ICS in selected ICS demand states. Here, this study began exploring more deeply the idea that taking practical measures to protect the child and place their rights and best interests at the heart of ICS is achievable, and that the public international law human rights framework (in particular the CRC) provides a mechanism by which to do so. It also assessed the extent to which the CRC was considered in ICS cases from national courts, drawing on case law from a sample of demand-side jurisdictions.

Following on from this, by contending with the sensitive issue of the preconception and prenatal situation of the child, Chapter Six ensures that this study's treatment of the child's rights situation in ICS is holistic. The central argument put forward in Chapter 6 is that in order for children born through ICS to enjoy and exercise their rights as far as possible post-birth, attention must be given to protecting these rights of the future child during the preconception and prenatal phases of ICS, so the child can exercise and enjoy their rights in the event that he or she is born. A range of actors have a role to play to make this a reality, with their various roles traversed in Chapter Six. The Chapter makes clear that this is not about attributing rights pre-birth, but rather protecting potential rights preconception and pre-birth, so the child is able to claim those rights post-birth.

Chapters Seven and Eight illustrate that although the child's rights are interrelated, indivisible and interdependent in nature,[28] two of the child rights most significantly at risk in ICS are the rights of the child to nationality and

27 H. Watt, *The Ethics of Pregnancy, Abortion and Childbirth: Exploring Moral Choices in Childbearing* (2016), at X.

28 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, CRC/C/GC/14, 2013, at [16(a)].

to preserve their identity, under Articles 7 and 8 CRC. Key practical solutions proposed in Chapter Seven to uphold the child's right to nationality and prevent statelessness are that a State which is the intended State of residence of a child born through ICS should grant nationality to the child if a genetic link with one commissioning parent is able to be proven and the child would otherwise be stateless; and that in instances of ICS where this does not occur and the child would otherwise be stateless, the child should acquire the nationality of their birth state. As Chapter Eight makes clear, the fundamental bearing that identity can have on a person means that the child's right to identity preservation is one of the most significant and pressing child rights challenges raised by ICS. The main argument advanced in Chapter Eight is that the child's Article 8 CRC right must be proactively and strongly safeguarded in ICS, in particular by commissioning parents, medical professionals, surrogacy clinics and states, in order for children to be able to preserve their genetic, biological, personal narrative and cultural elements of their identity. Through this study's treatment of the child's rights to nationality and identity preservation, the positive lifetime impact of protecting these rights for children is emphasised. Both Chapters provide detailed recommendations to achieve this in practice.

Although this thesis does not include a chapter focusing exclusively on legal parentage, the importance of establishing legal parentage for children born through ICS has been emphasised throughout the study; indeed, the case law analysed in Chapters Three, Four, Five and Nine demonstrates the importance of establishing a legal parent-child relationship for children in ICS. It is important for legal parentage to be established in a timely manner following the birth of the child in ICS; this can have a positive impact on the child's situation both in terms of certainty and stability regarding their care and protection and family environment. However, the process of decision-making to establish the child's legal parentage must consider the best interests of the child, as well as the rights and interests of the multiple potential 'parents' involved, including the surrogate's rights and interests. The ICS case law traversed throughout this study further emphasises the importance of establishing legal parentage for children in ICS, due to the positive impact that this can have on the child's rights to education, health and social security.

Chapter Nine presented a case analysis of the first landmark ICS judgments of the European Court of Human Rights.[29] This served to place the analysis and recommendations of Chapters Seven and Eight in context, given the ECtHR's focus on the child's nationality and identity rights. Furthermore, these cases were important to highlight as part of this thesis, as they prioritise the rights of the children involved and take an approach to balancing of rights

29 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014.

which protects the children's best interests.[30] However, as noted in the Addendum to Chapter Nine, the approach since taken by the Grand Chamber of the European Court of Human Rights in its first ICS judgment raises questions concerning the Court's approach to children's rights and best interests in ICS cases, and it remains to be seen the extent to which the Court seeks to

30 N.B. However, as outlined in the Addendum to Chapter Nine, since the time of writing Chapter Nine of this thesis, the Grand Chamber of the European Court of Human Rights has published its first judgment concerning international surrogacy. See: *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment, 24 January 2017. In this judgment, the Grand Chamber (by a majority of 11:6) reversed the earlier findings of the Court (Second Section). The Grand Chamber held that the measures taken by the Italian authorities (removal of a child from the applicants who shared no genetic link with the child, who was born through a surrogacy arrangement in Russia) had pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of children; therefore, these amounted to relevant and sufficient reasons. (see [196]-[199]) With regard to proportionality, the Grand Chamber held that the Italian Courts, by concluding the child would not suffer grave or irreparable harm as a result of his removal from the applicants' care (at [206]) (and also considering the absence of any genetic link between the child and the applicants, and the fact that they had breached Italian domestic adoption and ART laws through their actions), had struck a fair balance between the different interests at stake and within the State's margin of appreciation. (see [200]ff) The Grand Chamber observed that to let the child remain in the care of the applicants would have been tantamount to legalising a situation they had intentionally created in breach of domestic law. (at [215]) Interestingly therefore, through *Paradiso Campanelli v. Italy,* the Grand Chamber has re-emphasised the weight attached to the existence of a genetic link between a child born through international surrogacy and his or her commissioning parent(s) (as was emphasised in both the *Mennesson* and *Labassee* judgments), but it has given new weight to the actions taken by commissioning parents to obtain a child through international surrogacy in violation of the domestic law they circumvent through their actions. The judgment indicates that in such instances, even where an emotional and/or social connection has formed between the applicants and the child, if removal of the child will result in trauma which will not be irreparable, such a course of urgent action will be seen to be justified and proportionate in not only upholding national law and public interest, but also to protect the rights and freedoms of the child (such as their safety and welfare and protection against illicit practices, and the certainty of their legal relationship with their caregivers/parents). Of course, the exact factual matrix of the situation will be determinative to an extent; e.g. in *Paradiso,* the Grand Chamber noted the relatively short duration of the relationship between the child and the applicants as one of the factors taken into account when considering whether or not there was an existence of family life between the child and the applicants. (at [151]-[157]) The joint dissenting judgment of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev is worth noting, especially regarding its consideration of the child's best interests. The dissenting judges stated that in identifying the child's best interests in a particular case, two considerations are crucial, namely that it is in the child's best interests that his or her family ties are maintained, except in cases where the family has proved particularly unfit; and it is in the child's best interests to ensure his or her development in a safe and secure environment. (at [6]) The dissenting judges argued the majority attached too much weight to the need to put an end to an illegal situation and to discourage Italian citizens from circumventing domestic law in foreign jurisdictions, and stated that the Italian Courts had not adequately considered the impact of removal on the child's well-being, nor the impact the irreversible separation would have on the applicants. (at [12])

prioritise the rights of children in future ICS cases, taking into consideration their individual circumstances in contrast to the overall public interests at stake.

Chapter Ten illustrated the importance of rights balancing in ICS, given the conflicting rights and interests of the child with the other core parties to ICS. The importance of rights balancing in ICS has been engaged with throughout the thesis, for example, in Chapters Three, Four, Eight and Nine. Chapter Ten brought these strands together, arguing for rights balancing to take place throughout ICS arrangements on a case-by-case basis, guided overall by the concept of human dignity. This Chapter further argued that especially once a child is born through ICS, the child should be prioritised in actions and decisions in ICS affecting them, to ensure outcomes that are clearly focused on protecting the child's rights and which are consistent with the child's best interests.

Chapter Eleven forms the final chapter of this thesis, serving as an overall conclusion to the doctoral study, placing it in contemporary context and distilling the main findings of the study into a comprehensive framework of recommendations (see Section 6 of this Conclusion). If implemented, these recommendations would serve to protect the child's rights and best interests in ICS, while also guiding the balancing of core parties' rights and interests where these clash in ICS arrangements. The following schematic outlines how the chapters of the thesis connect to the study's research questions, and summarises the main contribution each chapter has made to addressing the research questions.

Ch.	*Title*	*Research question(s)*	*Main contribution to addressing research question(s)*
2	Contextualising a 21st Century Challenge: Part One – Understanding International Commercial Surrogacy and the Parties whose Rights and Interests are at Stake in the Public International Law Context	- Main research question.	Analyses why ICS is a twenty-first century human rights challenge and the parties whose rights and interests are at risk in ICS.
3	Contextualising a 21st Century Challenge: Part Two – Public International Law Human Rights Issues: Why Are the Rights and Interests of Women and Children at Stake in International Commercial Surrogacy	- Main research question; - Sub-question (a); - Sub-question (b); and - Sub-question (d).	Focuses on the rights of children conceived and born through ICS and surrogate mothers in ICS, identifying the main risks to their rights and how women and children in ICS experience some common human rights challenges in ICS.
4	Multiple 'Mothers', Many Requirements for Protection: Children's Rights and the Status of Mothers in the Context of International Commercial Surrogacy	- Main research question; - Sub-question (a); and - Sub-question (d).	Demonstrates the complexity of the mother-child relationship in ICS and presents analysis regarding the balancing of rights and interests of the child with those of his or her multiple 'mothers' in ICS.

Ch.	*Title*	*Research question(s)*	*Main contribution to addressing research question(s)*
5	International Commercial Surrogacy and Children's Rights: Babies, Borders, Responsibilities and Rights	- Main research question; - Sub-question (a); - Sub-question (b); and - Sub-question (c).	Argues the child is the locus of vulnerability in ICS, and analyses how and the extent to which international child rights standards and norms are being utilised in ICS decision-making, and the further scope that exists to do so, to protect and promote children's rights in practice.
6	Unconceived, Unborn, Uncertain: Is Pre-Birth Protection Necessary in International Commercial Surrogacy for Children to Exercise and Enjoy Their Rights Post-Birth?	- Main research question; and - Sub-question (a); - Sub-question (b); - Sub-question (c); and - Sub-question (d).	Argues decisions and actions taken in the preconception, prenatal and post-birth stages of ICS can impact on the rights of the child in ICS, and that in order to preserve the child's ability to exercise and enjoy his or her rights in the event he or she is born through ICS, decisions and actions taken pre-conception and prenatally should safeguard the child's rights and best interests, but that rights balancing exercises will be necessary.
7	Securing children's right to a nationality in a changing world: the context of International Commercial Surrogacy	- Main research question; and - Sub-question (a); - Sub-question (b); and - Sub-question (c).	Examines how children can become stateless through ICS and argues Art. 7 CRC right to a nationality is one of the children's rights most significantly at risk, but that the CRC and public international human rights law standards provide practical mechanisms which can be implemented to uphold the child's nationality right in ICS.
8	Answering the "Who am I?" Question: Protecting the Right of Children Born Through International Commercial Surrogacy to Preserve Their Identity Under Article 8 of the United Nations Convention on the Rights of the Child	- Main research question; and - Sub-question (a); - Sub-question (b); and - Sub-question (c).	Examines how children face challenges to preserving their identity in ICS and argues Art. 8 CRC right to identity preservation is one of the children's rights most significantly at risk in ICS, but that there are practical steps which can be taken by a range of CRC duty-bearers to uphold Art. 8 for children in ICS.
9	Case Analysis: Children's Rights to the Fore in the European Court of Human Rights' First International Surrogacy Judgments	- Main research question; and - Sub-question (a); - Sub-question (c); and - Sub-question (d).	Case analysis illustrating judicial decision-making considering the child's rights to nationality and identity in ICS, and the importance of the principle of the best interests of the child in decision-making and rights balancing in ICS situations.
10	Multiple Potential Parents But a Child Always at the Centre: Balancing the Rights and Interests of the Parties to International Commercial Surrogacy Arrangements	- Main research question; and - Sub-question (c); and - Sub-question (d).	Exploration of the rights balancing exercises necessary in ICS between the child and other core ICS parties, and between surrogate mothers and commissioning parents; proposes an approach to rights balancing in ICS consistent with the CRC and with broader public international human rights law concepts.

Ch.	*Title*	*Research question(s)*	*Main contribution to addressing research question(s)*
11	Conclusion	- Main research question; - Sub-question (c); and - Sub-question (d).	Demonstrates the role of public international human rights law in protecting and reinforcing the rights of children in ICS (and how the standards and norms of the CRC can be brought to bear in practice), by presenting recommendations proposed as a framework for a General Comment of the Committee on the Rights of the Child on protecting the rights of children in ICS, including how these can be balanced with competing rights and interests of other parties to ICS.

6 The Convention on the Rights of the Child as the framework for promoting and protecting the child's rights in ICS

6.1 The role of the CRC in protecting and reinforcing the rights of children in ICS

The main research question of this study sought to explore two things. Firstly, it asked "What is the role of international human rights law (especially the norms and standards established by the CRC) in protecting and reinforcing the rights of children in ICS?" This study has shown that the risks to the child's rights and best interests in ICS amount to a 21st century human rights challenge. Moreover, it has been demonstrated that the rights of the child most at risk in ICS require better protection than they are currently receiving, in order for children conceived and born this way to be able to enjoy and exercise their rights. By examining the international human rights standards and norms of particular relevance to the child's situation in ICS – and indeed, the rights which are most at risk in ICS – this study has demonstrated that the CRC provides a strong framework for promoting and protecting the child's rights in ICS. Providing this insight into the foundational importance of public international law human rights norms and standards in this context has highlighted that any approach to ICS at the national and international levels must begin with the rights of the child as the most vulnerable party in ICS. The standards and norms of the CRC and wider public international human rights law provide a platform upon which to develop responses to ICS which are child-centric, balancing the rights and best interests of the child with those of other core parties to ICS. Moreover, a dynamic interpretation of the CRC as a living instrument, in light of ICS as a contemporary development is warranted, to ensure children born through ICS can exercise and enjoy the rights to which they are entitled.

Taken together, these factors have demonstrated that public international human rights legal norms and standards – especially the CRC – have a very important role to play in protecting and reinforcing the rights of children in ICS. In the absence of international agreement concerning ICS nor an agreed international regulatory regime governing ICS practice; and in the face of a divergence of domestic law and policy and persisting child rights challenges arising through ICS, the norms and standards established by the CRC:

- serve to bring the focus of key actors in ICS (including States) onto the child as the person whose rights are most at risk in ICS;
- provide a near-universally agreed framework for human rights protection which can be implemented in practice to protect and reinforce the rights of children in ICS; and
- can guide decisions and actions in ICS, including to resolve contentious situations arising through ICS, thereby functioning as an arbiter and touchstone for child rights protection in ICS.

6.2 Understanding and approaching the rights of children in ICS from a public international human rights law, child rights perspective, and balancing competing rights in ICS

The second part of the main research question of this study asked "How should the rights of children involved be understood and approached from a public international human rights law, child rights perspective in relation to the other parties and rights-holders involved in ICS?" Taking a child rights perspective rooted in and informed by the CRC has served to maintain an underlying focus throughout the study on the inherent dignity of the child and their status as rights-holders, entitled to enjoy and exercise their full range of CRC rights, to outcomes consistent with their best interests, and to protection by duty-bearers. This study has shown that public international human rights law – and in particular the CRC – provides a tool which can help to ensure that the competing rights of the core parties to ICS can be navigated and balanced throughout the course of ICS arrangements, consistent with the concept of human dignity, whilst placing primary importance on the child's rights and best interests. This study has demonstrated that the balance to be struck between competing rights and interests in ICS needs to be considered on a case-by-case basis taking into account the specific circumstances involved, and that the balance to be struck between the parties rights and interests will likely differ depending on at what stage of an ICS arrangement (preconception, prenatal, post-birth) the rights balancing exercise takes place.

Throughout the chapters of this thesis, findings and recommendations have been presented, focusing on how CRC standards and norms can be better harnessed to increase protection of the child's rights and best interests in ICS. The findings and recommendations developed throughout the course of this

study and presented in the preceding chapters of this thesis provide guidance for promoting and protecting the rights of children in ICS. The findings and recommendations cover both general approaches for promoting and protecting child rights in ICS, as well as providing detailed guidance for implementing protection of the child's rights most at risk in ICS and balancing the child's rights with the rights and interests of other rights-holders in ICS. Where relevant, the findings and recommendations specify which of the core parties and wider actors involved in ICS should bear responsibility for implementation and protection measures.

Taken together, the 40 recommendations which can be distilled from this doctoral study are presented below in this Conclusion, in the form of a proposed framework for a Committee on the Rights of the Child General Comment on protecting and promoting the rights of children in ICS. The recommendations are grouped into four main categories:

- Overarching recommendations to promote and protect the rights of children in ICS;
- Safeguarding the rights of future children before conception and birth in ICS;
- Protecting the child's rights once born through ICS; and
- Balancing rights and interests in ICS.

It is noted that some of the recommendations proposed go beyond what may be politically palatable to States in the context of ICS. However, the recommendations are intended to indicate practical steps to leverage existing public international law child rights standards and norms which would and could have a protective effect on the rights of the child in ICS if implemented, as well as minimising harm to children and their rights in the continuing practice of ICS. Some of the recommendations can be implemented on an immediate timescale, and others over a longer time horizon, dependent on increased international agreement concerning ICS. Following the framework of recommendations set out below, Section 6.3 of this Conclusion outlines the rationale for why a General Comment would help to protect and reinforce children's rights in ICS and why a General Comment is a sound and useful public international law intervention to make in this context.

Framework of recommendations for promoting and protecting the rights of children in International Commercial Surrogacy
(proposed for use as a framework for a General Comment of the United Nations Committee on the Rights of the Child)

A. Overarching recommendations to promote and protect the rights of children in International Commercial Surrogacy

Taking a child rights approach in ICS

1. Given the child rights and human rights issues raised by ICS, a public international human rights law perspective, in particular a child rights approach, should guide and be a central feature of any approach addressing ICS at domestic, regional and international levels.
2. All efforts must be taken by the core parties and all actors involved in ICS to ensure that when ICS arrangements occur, they are child-centric, meaning that the child's rights, best interests and human dignity are promoted and protected.
3. The standards and norms established by the United Nations Convention on the Rights of the Child (CRC) must be comprehensively observed and implemented throughout the course of all ICS arrangements. In the absence of international agreement concerning ICS and/or international regulation of ICS, the CRC should guide all decisions relating to ICS, both at a general level and in relation to specific ICS arrangements.
4. The Committee on the Rights of the Child should require all CRC States Parties to report on the treatment of children in ICS in their jurisdiction as part of their periodic reporting obligation under the CRC.
5. In the long-term, States should develop domestic legal frameworks addressing ICS; work in cooperation to reach international agreement on ICS; and develop an international regulatory framework to govern any future practice of ICS. These should be grounded in international child rights standards and norms, to ensure the child's rights and best interests are paramount in ICS. This may necessitate the prohibition under law of some current aspects of the practice of ICS, for example, the use of anonymous gametes.

Guarding against sale and trafficking of children in ICS

6. Any new legislative or policy approaches concerning ICS at the domestic, regional and international levels should reflect and reinforce the international human rights norm that no child should be bought or sold.
7. All CRC States Parties and states involved in ICS in any way must remain alert to the potential of the trafficking and sale of children through ICS. As a first step, states should review their child trafficking and sale prevention and detection measures and systems, to ensure they safeguard children born through ICS from being trafficked and/or sold.

The impact of domestic legislation on children in ICS

8. Courts and governments should ensure that where changes to laws impacting on ICS are introduced, these changes are undertaken in a manner that does not negatively impact on the rights and best interests of children already born through ICS in the affected jurisdiction, or the rights and best interests of future children already conceived in that jurisdiction through ICS.
9. Governments should make public in a transparent and timely manner any changes to laws impacting on ICS arrangements, or changes to government positions regarding ICS (both in their own and other states), so that prospective commissioning parents can be advised as early as possible of any impact of these changes on future or existing children born through ICS. One possible method of making this information available is via regularly updated fact-sheets on government websites.
10. States involved in ICS should advise each other in a transparent and timely manner of any changes to the legal status of ICS in their territory. States receiving this information should communicate this publicly through channels that will reach prospective commissioning parents who are citizens or residents in their jurisdiction, to provide them with as much certainty and clarity as possible to make informed decisions about ICS.

B. Safeguarding the rights of future children before conception and birth in ICS

11. The CRC should be applied by all core parties and ICS actors before a child is conceived and before a child is born in ICS, to take an *in eventu* approach to preserve the future child's ability to enjoy and exercise their CRC rights once born. Taking such an approach in ICS is not attributing rights before birth, but rather can have a protective lifetime impact on the child in the event that they are born. It is consistent with the principles of human dignity and the best interests of the child.
12. CRC States Parties should implement key safeguards to encourage an *in eventu* approach to protecting the future child's rights in ICS at the pre-conception and pre-natal stages, namely:
    12.1 Educate medical professionals, legal advisors and prospective commissioning parents about the CRC rights most at risk for children in ICS as a result of preconception and prenatal actions and decisions, and how they can take decisions and act to uphold these rights for a future child; and
    12.2 Develop, establish, implement and monitor professional codes of practice/best practice guidance applying to processes used in ICS (including those in medical clinical settings) which raise preconception and prenatal risks to the future child's rights and best interests, particularly their rights under Articles 7 and 8 CRC.
13. In every ICS arrangement, from the time a pregnancy is confirmed, the intended state of birth (that is, the ICS supply-side state) should appoint an independent guardian for the future child.
    13.1 The guardian should have the mandate to represent the future child's rights and best interests, to ensure these are taken into account, advocated for

and are a central focus of the actions and decision-making processes of the adult parties to ICS during the prenatal phase; and

13.2 The guardian's mandate should remain in place until either:

a) the child's legal parentage is established; or

b) until after the child's legal parentage is established and a post-parentage monitoring period is concluded, and the child's rights and best interests are assessed as being protected to the satisfaction of the relevant authorities or court.

C. Protecting the child's rights once born through ICS

Decision-making by commissioning parents

14. When making decisions and taking actions in ICS that will affect the child (or the future child once he or she is born), commissioning parents should ensure that the child's actual or future best interests guide any decision that will affect him or her.

The child's right to non-discrimination

15. Children born through ICS must not be subjected to discrimination on the basis of their birth status (i.e. their conception and birth through ICS), or any other prohibited grounds of discrimination, such as disability, sex and the status of their parents.

15.1 Children born through ICS with a mental or physical disability are entitled to conditions ensuring dignity, and which promote self-reliance and facilitate the child's active participation in the community.

The child's right to nationality

16. Children born through ICS must be able to acquire a nationality from birth. Any grant of nationality to a child born through ICS must be made in a non-discriminatory manner and in accordance with the child's best interests.
17. The United Nations High Commissioner for Human Rights, in cooperation with the Committee on the Rights of the Child, should issue non-binding guidance to States to apply to children in ICS situations who would otherwise be stateless, reflecting the following clauses:

17.1 A State which is the intended State of a child's residence will, either prior to the birth of that child through ICS or as soon as possible following birth, grant nationality to the child if he or she would otherwise be stateless, as long as a genetic link between the child and one of his or her 'commissioning parents' is proved.

17.1.2 In order to ensure that the child is able to acquire nationality as soon as possible after birth through ICS, DNA testing will be made available immediately following the child's birth.

17.2 States will grant nationality to an otherwise stateless child born on their territory through ICS. The child should be assumed to be stateless if he or she:

a) has no genetic link to either of their 'commissioning parents' on the basis of DNA testing; or

b) is abandoned pre- or post-birth by their 'commissioning parents' in the territory of the birth State, regardless of whether or not he or she has a genetic link to his or her 'commissioning parents'.

Decision-making to determine legal parentage

18. Decisions determining the legal parentage of a child born through ICS should be made in as timely a manner as possible, to provide the child with certain and secure legal and family status, and protect their rights to education, health and social security.
19. Decision-making concerning the child's legal parentage in ICS should:
    a) treat the child's best interests and rights as paramount;
    b) consider the rights and interests of the child's multiple potential 'mothers'; and
    c) be consistent with the child's right to preserve the genetic, biological (birth) and social elements of their identity.

The child's right to know and be cared for by their parents and to grow up in a family environment

20. All children born through ICS should:
    a) be able to know all those people who may be interpreted as their 'parents' in some respect (genetic; biological (surrogate); social);
    b) be cared for by the people determined at law to be their legal parents;
    c) grow up in a family environment, in an atmosphere of happiness, love and understanding, directed towards the full and harmonious development of their personality; and
    d) be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person whose care they are in.

The child's right to preserve their identity

21. Children conceived and born through ICS must be able to enjoy and exercise their right to preserve their identity, including the genetic and biological elements of identity.
22. All states should outlaw the use of gametes and embryos from anonymous donors in ICS arrangements.
23. All states should outlaw the involvement of surrogates who act on an anonymous basis in ICS arrangements.
24. To uphold the child's Article 8 CRC right, commissioning parents should:
    a) only enter into ICS arrangements involving identifiable gamete and embryo donors, and identifiable surrogates;

b) only enter into ICS arrangements with medical professionals/surrogacy clinics with systems established and functioning to collect, store and protect information about all elements of the child's identity;

c) advocate before and after birth for the preservation of all elements of the child's identity, and wherever possible, take steps to do this themselves;

d) once the child is born, support him or her to develop, understand and thereby preserve his or her own identity, for example by sharing identity information with the child or supporting him or her to access identity information, in line with his or her evolving capacities; and

e) support the child and provide him or her with opportunities to know, understand and enjoy their ethnic, religious, cultural and linguistic background, including his or her background connected to his or her genetic parentage and biological heritage.

25. To uphold the child's Article 8 CRC right, medical professionals/surrogacy clinics should:

a) only facilitate ICS arrangements involving the use of gametes and embryos from identifiable donors who agree to be contacted by the future child;

b) only facilitate ICS arrangements involving identifiable surrogates (acting non-anonymously) who agree to be contacted by the future child;

c) collect, store and facilitate the child's access to specific information[1] about his or her genetic parents and birth mother (surrogate);

d) create, store and facilitate the child's access to a formal record of the particulars and circumstances of the child's birth;[2] and

e) compile the information specified under 25(c) and (d) in an identity dossier for the child, and provide a copy to the child's commissioning parents as soon as practicable following the child's birth; and store a copy in perpetuity (or until such time that it is accessed by the child) at the surrogacy clinic/by the medical professional overseeing the ICS arrangement.

26. ICS supply-states should take the following steps to uphold the child's Article 7 and 8 CRC rights:

a) legislate and implement policy placing a duty on medical professionals and surrogacy clinics to collect, store, protect and facilitate access to identity dossier for children born through ICS, and monitor and enforce the implementation of these requirements;

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1 In relation to the child's genetic parents (gamete/embryo donors), this includes: full name; date of birth; ethnicity and language spoken; current physical address, phone number and email address where available; significant health history (pertaining directly to the donor and regarding their family history); and the age and sex of any pre-existing genetic children. In relation to the child's birth mother (surrogate), this includes: full name; date of birth; ethnicity and language spoken; current physical address, phone number and email address where available; significant health history relating to the term of pregnancy and childbirth, insofar as it could impact the child's health; and any significant health history of pre-existing serious disease or medical condition.

2 Including, but not limited to: place of birth; date and time of birth; full names of every person present at the birth; details of the child's genetic make-up; details of the medical procedures undertaken to conceive the child (e.g. IVF; embryo implantation); and the particulars or a description of the child's health status at birth and in the days immediately following birth.

b) in cases of children born via the use of anonymous gametes or embryos in ICS, or to an anonymous surrogate, require, at the minimum, that an identity dossier is compiled, stored and protected for the child's access, including all available non-identifying information available about the donor(s) and the surrogate, along with information about the particulars and circumstances of the child's birth;

c) require that a copy of each identity dossier pertaining to a child born through ICS is provided to the State itself, for storage in a national, centralised repository system designed for storing and protecting these dossier for future access by the children to which they pertain to;

d) actively publicise the existence of the system collecting, storing and facilitating access of children born through ICS to their identity dossier, and facilitate a process whereby donors and surrogates can update their contact details in this system;

e) ensure all children born through ICS are registered immediately after birth and issued with a birth certificate following birth, including accurate and complete information as far as possible concerning the child's parentage and particulars of birth, including the names of the child's birth mother and genetic parents; and

f) explore whether for children born through ICS with anonymous genetic parents, annotation of birth certificates to reflect this fact would have a protective effect for children, or whether it may have a discriminatory or stigmatising impact on them.

27. In the long-term, it is advisable that States explore the feasibility of cooperating to establish and facilitate an inter-state system to protect identity information in the context of ICS;[3] under such a system, at the same time as the supply-state stores a copy of an identity dossier of a child born in that state, the supply-state should transmit a copy of the identity dossier to a formally designated state-level agency in the demand-state (the home state of the child's commissioning parents). That demand-state agency should receive, store and protect the identity dossier and establish a system facilitating access by the children they pertain to.

Care and protection of child victims in ICS

28. In situations where none of the core adult parties to an ICS arrangement take responsibility for the care and protection of the child born through the arrangement, the supply-side state (child's state of birth) and the demand-state (home state of the commissioning parents) should work closely together to reach agreement on where and how the child will receive alternative care; in taking such a decision, both states must act in accordance with their CRC obligations

3 Similar, e.g., to the system operating between Central Authorities of Contracting States to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993, entry into force 1 May 1995) in relation to the transmission of reports between States of Origin and Receiving States under Arts. 15 and 16 of that Convention (pertaining to the identity and background of prospective adoptive parents and prospective adoptable children).

and establish alternative care that is consistent with the child's rights and best interests.

29. Supply and demand states should take all appropriate measures to promote the physical and psychological recovery and social reintegration of any child born through ICS who experiences any form of neglect, exploitation or abuse (for example, children who are trafficked, abused or abandoned through ICS), in an environment fostering the child's health, self-respect and dignity.

Participation and protection of the child in ICS cases before judicial decision-making bodies

30. A lawyer for the child should be appointed in all ICS cases coming before courts of law or judicial decision-making bodies,[4] including for children in early infancy;[5] the lawyer for the child should have a mandate to advocate for and represent the child's rights and best interests under the CRC and applicable domestic law. The lawyer for the child should ensure the child can express their views to judicial decision-makers on matters affecting them, in line with the child's evolving capacities.[6]
31. Judicial decision-makers should place the child at the centre of all ICS cases, by:
    a) taking a holistic and lifetime-outcomes view of the child's situation, in particular paying attention to the care, safety and development of the child, and the enduring stability and sustainability of the relationships which are foundational to the child's on-going care, well-being and identity preservation;
    b) applying the best interests of the child principle on a case-by-case basis and considering all relevant CRC rights in judicial reasoning; and

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4 Ideally, this lawyer for child should represent the child as an independent party to proceedings, rather than expounding the law on the rights and best interests of the child impartially as a lawyer for child appointed on an independent 'counsel to assist the Court'/*amicus curiae* basis. As a party to proceedings represented by a lawyer, the child would have arguments presented on their behalf. However, in ICS situations this may not be practically feasible given it may not be possible to reach agreement on who would pay the child's legal fees for representation as a party to proceedings (and States may be unwilling to fund the child's legal representation). Therefore, appointing a lawyer for child on an *amicus curiae* basis – but on the understanding that lawyer would advance legal arguments on the child's behalf as an un-represented party to proceedings – may be a more workable approach in practice and State funding may be more accessible on this basis.

5 N.B. The UN Committee on the Rights of the Child observes "By virtue of their relative immaturity, young children are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, while taking account of their views and evolving capacities." UN Committee on the Rights of the Child, General Comment no. 7 on implementing child rights in early childhood (2005) at [13]. The Committee urges all States Parties to "make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests". General Comment no. 7 at [13](a).

6 This has also been emphasised by the UN Committee on the Rights of the Child in the context of implementing child rights in early childhood, urging States Parties to ensure that "children [are] heard in all cases [legal proceedings] where they are capable of expressing their opinions or preferences". UN Committee on the Rights of the Child, General Comment no. 7 on implementing child rights in early childhood (2005) at [13](a).

c) reflecting this focus on the child's rights and best interests in written judgments, including giving consideration to how written judgments may be important documents for the child in future to understand how their rights and best interests were treated.

D. Balancing rights and interests in ICS

32. Rights balancing is necessary throughout the course of ICS arrangements on a case-by-case basis to balance the competing rights of the core parties to ICS (child, surrogate, commissioning parents); the principles of human dignity and the best interests of the child must guide all rights balancing exercises in ICS.

The child's best interests

33. In assessing the child's best interests in ICS, priority should be accorded to the child or future child's rights to: preserve their identity; health; know and be cared for by their parents as far as possible; grow up in a family environment; be free from discrimination; and be free from any form of abuse or exploitation.
34. Assessing the best interests of the child in ICS must be aimed at ensuring the child's full and effective enjoyment of CRC rights and the holistic development of the child. All decision-making which will affect the child should assess continuity and stability of the child's present and future situation.
35. Once a child is born through an ICS arrangement, the child's rights and best interests should be treated as the paramount consideration by all private and public actors, and accorded the most weight in balancing competing rights and interests.

Balancing the rights and interests of the surrogate with those of the child and commissioning parents

36. In situations of competing rights in ICS occurring once the child is in utero but before the child is born, the surrogate's health, reproductive autonomy and human dignity must be accorded priority, however, the future child's rights and best interests should be protected wherever possible to safeguard their exercise and enjoyment once born.
37. Despite paragraph 36, in situations where the pregnant surrogate engages in actions or decisions unnecessarily endangering the foetus and therefore, the potential future child (that is, without a medical reason necessitating her action or decision), the balance of rights and interests will generally shift in favour of the commissioning parents and future child.
38. It is important to acknowledge the particular role that a surrogate undertakes in ICS arrangements, carrying the child to term and giving birth to the child, facts which cannot be displaced and which create a biological link to the child regardless of whether the surrogate shares a genetic link to the child or not. These facts should be taken into consideration in any rights balancing exercise in ICS.

Balancing the rights and interests of genetic donor parents with those of the child

39. The child's Article 8 and 24 CRC rights should be accorded priority and significant weight in the balancing of competing rights and interests between ICS genetic donor parents and children born through ICS, given the positive lifetime impact of these child rights being protected. Where genetic donor parents' privacy rights conflict with children's identity and health rights in ICS, the balance should weigh in favour of protecting the child's rights.

Balancing the rights and interests of the commissioning parents with those of the child

40. In balancing a conflict between the rights and interests of the child and their commissioning parents in ICS, the child's rights and best interests must be treated as the paramount consideration.

6.3 Arguments for the Committee on the Rights of the Child to issue a General Comment on the rights of children in International Commercial Surrogacy

As noted earlier in this Chapter, through its statements in some of its recent Concluding Observations, the Committee on the Rights of the Child has already indicated its concern regarding the promotion and protection of the rights of children born through ICS. By issuing a General Comment based on the framework of recommendations presented above, the Committee can send a strong message to CRC duty bearers that as long as ICS continues being practised, the rights and best interests of children conceived and born through ICS can and must be better protected and more assiduously upheld. A General Comment based on this framework is comprehensively rooted in the standards and norms established by the CRC, emphasising the interconnected and interdependent nature of the child's rights in practice in ICS. By explicitly requiring States Parties to report on the treatment of children in ICS in their jurisdiction via their CRC periodic reporting,[31] the Committee will impose a higher level of scrutiny on practices which are inconsistent with child rights.

Crucially, the General Comment can serve as a roadmap for States Parties to guide their implementation of the CRC for the promotion and protection

31 N.B. The Special Rapporteur on the sale of children, child prostitution and child pornography made the following recommendation in her Study on Illegal Adoptions, appearing as Part III of *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography*, A/HRC/34/55, 22 December 2016, at [99]: "The Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women should request States parties to the Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography to provide information about concerns related to illegal adoptions and international commercial surrogacy arrangements, notably in preparation for the Committee's consideration of periodic reports."

of the rights of children in ICS, taking a holistic view of their rights and balancing them in relation to the other core parties to ICS. The framework of recommendations outlined above makes clear that there are steps which can be taken now, by States, the core parties to ICS and the wider actors involved in ICS, which can have a protective effect on children, without having to wait for international agreement on the practice of ICS. A General Comment built on the framework would likely prove helpful to the work underway at the international level concerning international surrogacy, both under the auspices of the International Social Service and the Hague Conference on Private International Law, and should, therefore, be viewed as complementary to these ongoing international efforts.

While focused squarely on protecting the child in ICS, the framework of recommendations reflects a broad perspective regarding the possible audience to whom they may be helpful. They are intended to be of use in guiding the decisions and actions of all the core parties to ICS (children, surrogates, commissioning parents, genetic donor parents), as well as to the wider actors involved in ICS (for example, medical practitioners, lawyers, surrogacy brokers), and to decision-makers in ICS (for example, State-based actors including social workers, government ministers and judges). Beyond their use as a practical tool to promote, protect and prioritise the child's rights in ICS on a case-by-case basis, the framework of recommendations should also assist policy-makers and legislators at the national and international levels, in future efforts to frame new laws and policies pertaining to ICS.

Of course, the framework of recommendations put forward as a result of this study will, even if incorporated in a Committee on the Rights of the Child General Comment, remain soft law; therefore, it will largely remain a choice for States Parties whether or not and to what extent they implement the recommendations. However, many states directly involved with ICS are currently grappling with the human rights, child rights and protection issues arising from the practice of ICS. For some such states, guidance of this kind from an authoritative body such as the Committee on the Rights of the Child will likely be welcomed given its effect of clarifying how the CRC's standards and norms can be implemented in practice. It may well prove helpful to those states as they seek to determine how they approach ICS at the legislative, policy and case-by-case levels, and how they work in cooperation with other states. By acting consistently with the framework of recommendations in ICS, states will help to foster a culture of understanding and commitment to the protection of the child's rights in ICS amongst the international community of states (States Parties as the principal CRC duty bearers), as well as amongst private actors involved in ICS, most importantly commissioning parents (given their particular role as non-State duty bearers under the CRC).

Indeed, it is important to recall in this respect that CRC States Parties have an obligation to "make the principles and provisions of the Convention widely

known, by appropriate and active means, to adults and children alike."[32] Given the responsibility of all parents under Article 18(1) CRC to make the best interests of the child their basic concern, commissioning parents will certainly need to play an instrumental role in ensuring children conceived and born through ICS can realise their rights as outlined under the framework recommendations. However, the relationship between States Parties and commissioning parents is symbiotic in this respect. Commissioning parents will need to know about the recommendations and understand the role that they have to play as commissioning parents in protecting the child's rights and best interests in ICS, in order to be able to actively implement the recommendations to ensure the child is prioritised in actions and decisions concerning them. States Parties can play a significant role in encouraging such action, by promoting the recommendations to commissioning parents.

7 Envisaging International Commercial Surrogacy arrangements that protect the children at their centre

Taking into account the examination of the child's rights in ICS presented in this thesis and the protection framework rooted in the CRC which has been proposed, it is possible to discern a minimum 'ideal state of affairs' to strive for regarding the child's rights in ICS, as long as the practice continues. If the recommendation framework proposed above is implemented, this would lead to a minimum ideal state of affairs whereby:

- It is recognised that some child rights risks in ICS begin before conception and birth and that these manifest once the child is born, but can be safeguarded against by taking an *in eventu* approach to protecting child rights in both the preconception and prenatal phases of ICS;
- Children born through ICS preserve their identities to the greatest extent possible, as a result of systematic safeguarding of identity information and the avoidance of the use and involvement of anonymous gametes and anonymous surrogates;
- Children born through ICS have a clear and secure child-parent relationship recognised by law at the earliest possible stage;
- Children born through ICS are registered immediately after birth and are able to acquire a nationality;
- All decisions and actions relating to children born through ICS are guided by the principle of the best interests of the child, leading to outcomes for the child consistent with, and giving effect to, their CRC rights;

32 Art. 42 CRC.

- Children conceived and born through ICS are treated in a manner which is non-discriminatory, regardless of the circumstances of their conception and birth through ICS or any other prohibited grounds of discrimination;
- All states are actively engaged in considering the impact of their laws, policies and practices on the rights of children born through ICS, and whether specific proactive steps need to be taken in order for the child's rights under the CRC to be upheld and safeguarded in the context of ICS; and
- Any legislation, regulation and policy pertaining to ICS is informed by a human rights-based approach, reflecting international human rights standards and norms, with the child's rights and best interests being of foremost importance, balanced with the rights of others in ICS, guided by the concept of human dignity.

8 Prospects for a long-term approach to protecting the child's rights in International Commercial Surrogacy

In 2012, I stated that

> 'ICS arrangements tend to be complex given their international dimension and the matter they deal with: human life. Whilst there is a strong argument for international regulation, international agreement remains a distant possibility. This is due to the complexity of the issue, especially the minefield of ethical issues (related, but not limited to, aspects of ICS such as human dignity, commodification of human reproductive functions and bodily matter and commodification of children), and divergent State positions.'[33]

This remains an accurate assessment regarding the prospects for a long-term approach to protecting the child's rights in ICS. The drafting and conclusion of any international instrument governing the practice of ICS will, ideally, need to be informed by comprehensive (and no doubt difficult) discussion at the international level around the larger issues of the value society places on human life, children and human reproduction. Indeed, it is clear from this study and the many cases of ICS which have been analysed, that in part it is because of the lack of international consensus on these matters of public interest in relation to ICS that ICS has become such a problematic practice from a human rights perspective. As part of such discussions preceding any international consensus as to the approach to be taken regarding ICS, further contentious issues will likely require resolution, such as whether ICS constitutes

33 I first presented this statement in 2012 at the World Social Work and Social Development Conference, 8-12 July 2012. It was later published as: C. Achmad, International Commercial Surrogacy: 21st Century Global Families in Transition', in S. Hessle (ed.), *Global Social Transformation and Social Action: The Role of Social Workers*, (2014), 137-146.

the sale of children (noting that the Committee on the Rights of the Child has now stated that ICS can lead to sale, but has not yet gone so far as to say it is sale);[34] whether it is in fact possible to 'buy' a child with whom one shares a genetic link; and whether or not the existence of a genetic link between commissioning parents and children in ICS is a decisive factor in international acceptance or rejection of the practice in the long-term.

Of these contentious issues, it is likely that reaching a definitive view on whether or not ICS is tantamount to the sale of children under international law – regardless of how it is practised – will be the most difficult. This study has not explored the legality or otherwise of ICS; rather, this study has acknowledged the reality of the existence of the practice of ICS and focused on protection and promotion of child rights through envisaging practical implementation of the CRC. However, it has become clear through research undertaken to inform this study that although not all instances of ICS amount to sale of children, in some instances ICS arrangements are being undertaken in ways that fall within the definition of 'sale of children' under public international law.[35] However, whether a specific ICS arrangement amounts to sale of children under public international law depends on the facts of the situation involved, in particular the payment structure of the ICS arrangement in relation to the transfer of the child. More work outside of the scope of this thesis is needed to identify more clearly when and how ICS amounts to the sale of children. This is an issue which the United Nations Special Rapporteur on the sale of children, child prostitution and child pornography should continue focusing on, under her mandate to consider matters relating to the sale of children to analyse the root causes of sale of children, addressing all the contributing factors, especially the demand factor, and to make associated recommendations.[36]

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34 Committee on the Rights of the Child, Concluding observations on the consolidated third and fourth periodic reports of India, (2014), CRC/C/IND/CO/3-4, at [57](d).

35 Art. 2(a), Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, United Nations Treaty Series, vol. 2171, 227.

36 Human Rights Council, Res. 7/13, Mandate of the Special Rapporteur on the sale of children, child, prostitution and child pornography (27 March 2008). N.B. the Special Rapporteur's *Study on surrogacy and sale of children*, A/HRC/37/60, p.3ff. Previously too, the Special Rapporteur has indicated her concern about the practice of ICS; see, e.g. the Rapporteur's Study on Illegal Adoptions, appearing as Part III of Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, A/HRC/34/55, 22 December 2016, pp.4-24. Importantly, the Special Rapporteur she has noted that "The international regulatory vacuum that persists in relation to international commercial surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights, and the practice often amounts to the sale of children and may lead to illegal adoption. Indeed, several countries do not recognize such arrangements and, in order to establish a parent-child relationship, national laws often require parents to legally adopt the child born through international commercial surrogacy." (at [52] of the aforementioned 2016 Report).

Although international consensus on ICS will be difficult to achieve, the now on-going proactive work at the international level to address some of the challenges arising through ICS is a very positive development. The framework of recommendations proposed in this thesis from a child rights perspective could be used to help inform this work insofar as it relates to children in ICS, for example by the Hague Conference Experts' Group on Parentage/Surrogacy. The framework of recommendations could serve as a base document and useful guiding tool to ensure that a human rights approach, with a focus on the person at the centre of all ICS arrangements and most at risk – the child – is a primary consideration, as the Hague Conference Experts' Group continues to explore the feasibility of an international instrument to address ICS.

As work continues concerning possible long-term approaches to ICS, it is also important to bear in mind the observation made by Keyes and Chisholm that efforts to discourage surrogacy could have the effect of driving the practice underground.[37] International policy-makers and legislators must therefore remain conscious of the potential (unintended) consequences which may be triggered if ICS was in future subjected to a global ban, and ensure adequate consideration is directed towards how such consequences may be mitigated. Thought will also need to be given to how states share responsibility regarding ICS; even if a global ban is imposed, ICS will still continue to be practised to some extent. Therefore, states will need to consider how they will cooperate in such instances, especially regarding the protection of the rights of children born this way, who should not be penalised or discriminated against on the basis that they were conceived and born through an illegal practice, something which is beyond their control.

Moreover, international efforts to increase protection and safeguards for those most vulnerable in ICS – especially the child – should be founded on the impetus reflected in the statement by Biggs and Jones that "[u]ntil a dedicated international convention on surrogacy is devised to establish an appropriate framework for inter-jurisdictional cooperation, akin to the Adoption Convention, these vulnerabilities [of the child] will continue."[38] Based on the findings of this doctoral study, it is also clear that a "differential emphasis [emphasising the rights of children as most vulnerable] seems justifiable

37 M. Keyes and R. Chisholm, "Commercial Surrogacy – Some Troubling Family Law Issues", (2013), available at https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/flc-submission-professor-mary-keyes-griffith-university-16july2013.pdf (accessed 29 July 2016), at 37.

38 H. Biggs and C. Jones, 'Legally Vulnerable: What is Vulnerability and Who is Vulnerable?', in M. Freeman, S. Hawkes and B. Bennett (eds.), *Law and Global Health: Current Legal Issues* (2014), Vol. 16, at 146. For further discussion regarding prospects for an international convention addressing ICS, see S. Mohapatra, "Adopting an International Convention on Surrogacy – A Lesson From Intercountry Adoption", (2016) 13 *Loyola International Law Review* 25.

in a global surrogacy context where we need to consider whose vulnerabilities matter most in devising appropriate legal responses and regulation."[39] This study has demonstrated that a framework exists under international human rights law that should not only be implemented in practice to ensure respect, protection and fulfilment of the child's rights in ICS, but which should be utilised to inform any new approach to ICS at the domestic and international levels. By focusing on the particular rights of the child and the principles of the CRC most at risk in ICS, a human rights approach can be taken to frame future regulation, legislation and policy at the international and domestic levels in a manner that will prioritise the rights of the child but also benefit all core parties to ICS.

9 Concluding remarks

Despite Dickensen's assertion in early 2016 that "The global trade in babies born through commercial surrogacy is slowly being shut down",[40] children are continuing to be conceived and born through ICS. Given that the technology is now available to make this possible and the fact that globalisation has made the world a much smaller place, and due to the ongoing demand for this method of family-building, ICS looks set to continue to some extent. This is despite the continuing evolution of new methods of family-building grounded in technological and scientific advances, such as the conception of children using DNA from three parents through mitochondrial transfer (now legal in some jurisdictions),[41] and extrauterine foetal incubation of human beings in artificial wombs.[42] Currently, ICS remains a much more accessible alternative method of family-building. Its continued use does not mean that we cannot do more to protect those most at risk in ICS: children. This study has demonstrated that these children are being created through and born into risk-laden

39 *Ibid*.

40 D. Dickensen, "The End of Cross-Border Surrogacy?", *Project Syndicate*, 25 February 2016, available at https://www.project-syndicate.org/commentary/crackdown-on-international-surrogacy-trade-by-donna-dickenson-2016-02 (accessed 29 July 2016).

41 The United Kingdom was the first state in the world to legislate to make this practice legal, via The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015.

42 Children who are born through these methods should also be able to enjoy and exercise their full range of rights under the CRC; some of the child rights issues traversed in this thesis will also arise as child rights challenges in these other new contexts, e.g. the child's right to preservation of identity when multiple parents are involved (mitochondrial transfer) and when there is no foetal-maternal link through pregnancy and childbirth (artificial wombs). For preliminary discussion of the potential impact of gestation in artificial wombs on children, see J.A. Robertson, 'Other women's wombs: uterus transplants and gestational surrogacy', 3(1) *Journal of Law and the Biosciences* (2016), available at: https://academic.oup.com/jlb/article/3/1/68/1751311/Other-women-s-wombs-uterus-transplants-and?searchresult=1 (accessed 29 July 2016).

circumstances. At best, many of their CRC rights are jeopardised by virtue of being born through ICS. At worst, they are breached as a result of the circumstances of their conception and birth, through actions and decisions being taken that do not align with what is in their best interests.[43]

This study is unique as it provides an examination of the practice of ICS from a child-centred perspective, using a child rights framework. In doing so, it has demonstrated the important role of public international law human rights standards and norms in addressing this 21st century human rights challenge. By translating the CRC's standards and norms into a framework of recommendations, this study presents a practical framework for protecting the child's rights in ICS, something which has not been done before with this focus. Indeed, many of the recommendations can be implemented in a relatively straightforward manner by a range of actors involved in ICS, without needing to wait for new international or domestic regulation of ICS to be established. These recommendations harness existing child rights and international human rights standards and norms to shine a light on the obligations that states, as well as private actors involved in ICS, bear in relation to the children conceived and born through this practice.

By taking up the framework of recommendations in a General Comment on the rights of children in ICS, the Committee on the Rights of the Child would provide guidance that is needed by a range of child rights duty-bearers internationally. Implementing the protection framework devised through this thesis in the face of the on-going regulatory lacunae concerning ICS holds the promise of the CRC's "protective shadow"[44] being cast over this group of children. Granted, some of the recommendations will be more straightforward to implement than others; for example, appointing a guardian for the child in all instances of ICS from the time a pregnancy is confirmed is a measure that states may well be reticent towards, given the administrative and financial resource required. However, the reality is that such a measure is likely to help to reduce conflicts arising in ICS arrangements, which is not only in the future child's interests, but also in the interests of the other core parties to ICS. With a particular focus on the child's rights relating to identity, nationality, parentage and the principles of non-discrimination and best interests under the CRC, and by implementing the framework of recommendations proposed, a minimum ideal state for the child's rights and best interests can be achieved, with children conceived and born through ICS at least having their rights and best interests more routinely considered and better protected.

43 C. Achmad, "Protecting the Locus of Vulnerability: Preliminary Ideas for Guidance on Protecting the Rights of the Child in International Commercial Surrogacy", in T. Liefaard and J. Sloth-Nielsen (eds.), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2017).

44 *Ellison v Karnchanit* [2012] Fam CA 602, at [84].

Although this study has delivered on its aims and been successful in answering the research questions established at the outset, there is still much more to be researched and learnt about the long-term impacts for children conceived and born through ICS and their families. To follow-up on the foundation set by this thesis, a major piece of work to be undertaken (by the author, preferably in collaboration with multidisciplinary researchers, and drawing on the experience of those working with children in ICS, such as social work professionals[45]) is to explore the lived experience of children born through ICS.[46] This would examine how children experience their CRC rights and the extent to which the actions and decisions taken preconception, pre-birth and post-birth in relation to their creation through ICS impacts on their enjoyment and exercise of their CRC rights. Such a research project could most usefully focus on issues relating to identity preservation, family environment, health, ethnic and cultural background and commodification. Ideally, the research would concurrently focus on the experiences of children born through altruistic surrogacy, to provide a comparative perspective. To take a child participatory approach so that the perspectives and voices of children conceived and born through ICS fully inform this future research project, it would preferably take an empirical research methodology, via a longitudinal study with a group of children born through ICS, benchmarked against the core rights at risk in ICS. This would enable the mapping of the impact on specific child rights in practice. Such research would have the aim of examining the children's lived experiences in line with their evolving capacities as they grow older, to build a picture and understanding of their enjoyment and exercise of rights. However, the sensitivities and ethical challenges involved in such a research project are acknowledged as likely being difficult to surmount, especially in relation to issues such as identity and commodification.

Other pieces of work identified through the course of this doctoral study as being ripe for further exploration from a child rights perspective are:

- Analysis and research regarding whether or not ICS definitively amounts to the sale of children;
- Research into the situation of children abandoned following birth through ICS in their state of birth. Little is known about this group of children, and it would be helpful to explore issues such as whether they are recognised as existing under national systems; more generally the situation of their

45 The significant insight of social work professionals into the situation of the child in ICS is reflected in K.S. Rotabi et al, "International private law to regulate commercial global surrogacy practices: Just what are social work's practical policy recommendations?", *International Social Work,* 58 (2015) 4.

46 Such a study would be complementary to empirical research already undertaken to develop understanding of the situation of surrogate mothers in ICS (including their relationships with commissioning parents and the children they give birth to through ICS), e.g. A. Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India,* (2014); and A. Majumdar, *Kinship and Relatedness in Commercial Gestational Surrogacy in India,* (2014).

care and protection following abandonment; and whether responsibility for such children should rest with the supply-side or demand-side state;
- Research into the impacts of ICS on the rights and best interests of the pre-existing children of women who act as surrogates, as well as the rights of genetic siblings of children born through ICS, and whether a global network of ICS siblings will exist as a result of the involvement of gamete donors in multiple ICS arrangements;
- Research into the weight to be attached to the genetic link between children and their commissioning parent(s) in ICS, and the importance to be attributed to this factor in determining legal parentage for children born through ICS; and
- Consideration of the likelihood of class actions being taken by ICS children in future against CRC States Parties in domestic jurisdictions and through the CRC complaints procedure,[47] on the basis of arguments such as 'I should not have been allowed to have been born this way' and 'steps should have been taken to protect my identity preservation right so I can understand where I come from and who I am'; and the viability of such claims.

Even if one does not accept that ICS can ever be a child rights-consistent method of family building, this does not displace the fact that while the practice continues, legal obligations exist under the CRC to ensure protection of the rights and best interests of children who are conceived and born this way. Ultimately, ICS presents a global human rights challenge necessitating an internationally agreed approach. To this end, international cooperation mechanisms and initiatives focusing on possible multilateral approaches to ICS should be actively supported.[48] In the long-term, how we choose to approach ICS will reflect the value society places on human life, human reproduction, and children. This study has shown that until such a time that international agreement can be reached on ICS, in the face of its continued practice, it is imperative that we choose to place the child at the heart of ICS. By protecting the child's rights and upholding their best interests, this will have the wider effect of protecting the rights of other vulnerable parties (such as surrogates), and reaching appropriate balances concerning the competing rights and interests of core ICS parties, maximising protection of the rights of the most vulnerable parties at stake. The framework of recommendations proposed through this study form a touchstone for ensuring the practice of ICS, where it continues to occur, does so consistently with the child's rights and best interests. Protecting the child's rights should lead to more positive family

47 Optional Protocol to the Convention on the Rights of the Child on a communications procedure, A/RES/66/138 19 December 2011, entry into force 14 April 2014.

48 E.g. the work ongoing under the auspices of the Hague Conference, ISS, and the Special Rapporteur on sale of children, child prostitution and child pornography.

outcomes, with the potential for interconnected, cross-cultural children growing up in supportive families where the child has an understanding of their multifaceted parentage.

Children are at the centre of all ICS arrangements, but we must do more to accord priority to their rights and best interests. To do so will send a clear message to this group of children that they are valued, they are equal rights-holders, and that their human dignity must be respected and protected. To not do so will mean the possibility of a generation of children dispersed around the globe who are faced with a lifetime of rights-related challenges as they grow into adulthood. By actively harnessing the CRC's protection framework, many of the child rights challenges triggered through ICS can be guarded against, in the best interests of children who did not choose to be conceived and born this way.

Summary

International Commercial Surrogacy (ICS) has emerged over the past decade as a new method of family formation, occurring across borders in response to demand from prospective parents and supported by technological advances in medical science and global interconnectedness. It raises human rights challenges to the core parties to ICS who are most vulnerable, namely the women who act as surrogate mothers and the children who are born as a result. No international consensus exists regarding the practice of ICS; this is reflected in the diverse legal positions taken by states regarding ICS and the divergence in state approaches to ICS in domestic legislation and policy. Furthermore, ICS is being practiced in the absence of any international regulation, involving a number of core parties with different motivations, rights and interests at stake in ICS arrangements. As a result, the rights and interests of different parties to ICS can clash.

Therefore, ICS raises profound ethical, moral and legal questions, which remain largely unresolved. However, in the face of this reality, children are continuing to be born through ICS, and as a result are at a heightened risk of their rights being infringed. A child is at the centre of all ICS arrangements, and like all other children, children born through ICS are entitled to exercise and enjoy their full range of rights under the United Nations Convention on the Rights of the Child (CRC). In practice though, children who are born through ICS are in some instances experiencing significant challenges to – and in some cases violations of – a number of their CRC rights. Therefore, ICS presents not only a twenty-first century human rights challenge, but a contemporary child rights challenge, in need of attention from a child rights perspective under public international human rights law.

This thesis is comprised of a collection of articles which have been written over a period of time during which ICS has been rapidly developing. The majority of the articles included as part of this thesis have been submitted for publication and published in a range of journals and edited volumes. They are brought together in this thesis to present a comprehensive exploration of the children's rights most at risk in ICS and the practical ways that the CRC can be brought to bear to ensure children's rights are protected, promoted and upheld in ICS.

The main research question this thesis is concerned with is:

What is the role of international human rights law (especially the norms and standards established by the CRC) in protecting and reinforcing the rights of children in ICS, and how should the rights of children involved be understood and approached from a public international human rights law, child rights perspective in relation to other ICS parties and rights-holders?

The subsequent research questions which are analysed are:

- *How does ICS present a challenge to children's rights?*
- *What rights of the child are most at risk in ICS?*
- *How can international human rights law norms and standards (especially those established by the CRC) be utilised to protect the rights of children in ICS situations?*
- *How should the various competing rights and interests of children and others in ICS situations be balanced using an approach consistent with, and drawing on, public international law human rights norms and standards?*

Limited scholarship exists on ICS from a child rights perspective under public international human rights law; this thesis seeks to help address this gap in scholarship. In addition, this thesis seeks to:

- explore and better understand the ways in which the child is vulnerable and how child rights are at risk in ICS;
- provide insight into how the public international human rights law framework – especially the CRC – provides a protective framework for children conceived and born through ICS, and how this can be harnessed to ensure children can exercise and enjoy their CRC rights, regardless of their conception and birth through ICS; and
- provide practical suggestions for how the child and their rights can be better protected in ICS.

Chapter 1 provides an overarching introduction to the thesis as a body of work. It sets out the research questions which the doctoral study explores; outlines the methodological approach and scope of the study; and explains the place of the thesis in the 'state of the art'. The Chapter introduces ICS as a phenomenon and explains how ICS is being practiced, as well as outlining the rationale for a focus on the rights of the child in the context of ICS through a public international human rights law lens. A clear overview of the structure and outline of the thesis is provided.

Chapter 2 discusses the emergence and development of the ICS market and predominantly focuses on introducing the parties whose rights and interests are at stake in ICS, the 'core parties' to ICS arrangements, namely the child, the surrogate and the commissioning parents. The main bioethical and moral challenges raised by ICS are briefly touched upon and provide important background context to the legal, child rights focus of the thesis. This Chapter

also foreshadows some of the issues triggered in ICS by the existence of competing rights and interests of the core parties to ICS arrangements.

Chapter 3 focuses on the rights of children conceived and born through ICS and the rights of surrogate mothers in ICS. Primary emphasis is placed on the rights of the child at stake, with a secondary focus on the rights of surrogate women in ICS. Central challenges to the child's rights in ICS are identified and discussed, in the context of and with reference to the relevant provisions of the CRC. This begins building a picture of the potential negative impacts of conception and birth through ICS on the rights of children. This Chapter also provides an overview of some of the key human rights issues pertaining to women in the ICS context, and discusses some of the human rights challenges common to both surrogate women and children in ICS, namely the risks of commodification and human trafficking. In doing so, this highlights the broader human rights picture at play, again emphasising the intersecting nature of many of the rights and interests at stake in ICS.

Chapter 4 demonstrates the complexity of the mother-child relationship in ICS and presents analysis regarding the balancing of rights and interests of the child with those of his or her multiple 'mothers' in ICS. This Chapter brings a unique focus from an international human rights law perspective to one of the central relationships in all ICS arrangements, between the child and their potential multiple 'mothers'. It discusses the construct of 'mother' as inherently related to 'child', and analyses the different 'mothers' involved in ICS: surrogate (the only person with a foetal-maternal link through the biological act of carrying to term and giving birth to the child); genetic (the only woman with a DNA link with the resulting child); and commissioning (where a woman is involved, the woman or women who want(s) to parent the child). This discussion illustrates that establishing the status of the various potential mothers in ICS is both socially and legally complex. In doing so, this Chapter draws attention to the contestable nature of the notion of 'mother' in ICS and traverses the corresponding implications for the rights of children. The potential interests of each of the 'mothers' in ICS *vis-à-vis* the child are examined, and attention is given to how such rights and interests might be balanced with the rights of the child.

Chapter 5 deepens the focus on the child's rights in ICS and develops the idea of the child as the locus of vulnerability in ICS arrangements. As part of this analysis, this Chapter presents an extended discussion of the ethics and economics of the commercialisation of the conception of children. Specific CRC rights which are at the most significant risk in ICS are highlighted: the child's right to nationality and to preserve identity, to grow up in a family environment, and to education, health and social security. This Chapter also highlights jurisprudential trends (through case law analysis) and non-judicial responses (especially national guidelines/government guidance as quasi-policy approaches to ICS) in three ICS 'demand' states (Australia, New Zealand and the United Kingdom). These are examined in relation to the child rights

framework, to assess the extent to which child rights are being promoted, protected and upheld through these responses to ICS. This Chapter illustrates that the clash of rights involved in ICS between the child and the other core parties is difficult to avoid, but that increased efforts and measures to place the child's rights and best interests at the heart of the practice of ICS is both necessary and possible.

Chapter 6 ensures that this study's treatment of the child's rights situation in ICS is holistic, by considering how decisions and actions taken during the preconception and prenatal phases of ICS can impact on the rights of children once they are born through ICS. Indeed, certain CRC rights may be negatively impacted once children are born through ICS, by actions and decisions taken prior to their conception and birth. This Chapter focuses exclusively on this issue. It identifies and examines these preconception and prenatal challenges to the child's rights in ICS and contends that due to the intentional, planned nature of ICS and the involvement of multiple possible parents, steps should be taken to protect the future child's rights both preconception and prenatally in all ICS arrangements. Analysis presented in this Chapter illustrates that no international consensus exists regarding pre-birth rights protection, as reflected in domestic jurisprudence, regional human rights jurisprudence, national constitutions and international human rights law. However, the CRC leaves open the option of its application to the pre-birth context; jurisprudence reflects that it is possible for some protection to be afforded before birth to a future child, without conferring rights pre-birth. A suggested approach to pre-conception and prenatal protection of the future child's rights in ICS is outlined, including three basic safeguards that can be practically implemented to ensure children can exercise and enjoy their CRC rights in the event that they are born through ICS. A range of actors have a role to play to support this, and their various roles are discussed. The Chapter makes clear that this is not about attributing rights pre-birth, but rather protecting potential rights preconception and prenatally in ICS, so the child is able to claim those rights post-birth.

Chapter 7 analyses one of the main children's rights challenges in ICS: securing the child's right to a nationality under Article 7 CRC. Children born through ICS are sometimes born stateless and stranded in their birth state. This Chapter provides an overview of the child's Article 7 right and discusses why and how child statelessness arises in ICS. As evidenced by case law, children born through ICS may face difficulties in acquiring nationality in three scenarios in the context of ICS, namely a) when a lack of recognition of the child's parentage prevents nationality acquisition; b) when nationality laws of the child's birth state and their commissioning parents' state of nationality conflict; and c) when a child is abandoned in his or her birth state by his or her commissioning parents. The intersecting nature of the child's right to a nationality with other CRC rights is emphasised in this Chapter, as well as drawing attention to state responses to the issue of child statelessness in ICS. It argues that the absence of international consensus concerning the practice of ICS does

not need to be a barrier to cooperation between States to prevent child statelessness in ICS. Drawing on existing public international human rights law standards and child rights principles, this Chapter proposes practical solutions to the problem of child statelessness in ICS, to prevent further children from being precluded from enjoying their right to a nationality. Specifically, Chapter 7 recommends that international guidance should be issued reflecting that a State which is the intended State of a child's residence in ICS will grant the child nationality if he or she would otherwise be stateless, as long as a genetic link between the child and at least one commissioning parent is proved; and that States will grant nationality to an otherwise stateless child born on their territory through ICS.

Chapter 8 examines the child's right to identity preservation as established by Article 8 CRC, in the context of ICS. Like the child's right to nationality, the right to identity preservation is one of the child's rights most at risk in ICS and is at the heart of the child rights challenges arising through ICS, given the wider impact identity has on the child's lifetime outcomes. Although nationality is an element of identity, it is just one of many elements in this respect. This Chapter therefore identifies other elements of child identity endangered in ICS (genetic and biological (including the health rights implications for the child); personal narrative; and cultural), as well as examining why identity preservation is so important in the ICS context. This discussion is grounded in Article 8 CRC, regional human rights jurisprudence, and draws on lessons from adoption, donor-conception and domestic surrogacy. The central argument advanced in Chapter Eight is that the child's Article 8 CRC right should be proactively and strongly safeguarded in ICS, in particular by commissioning parents, medical professionals, surrogacy clinics and states, in order for children to be able to preserve their genetic, biological, personal narrative and cultural elements of their identity. Chapter 8 makes the case that in instances where this right is not protected and upheld, it will have a lifetime impact on the child. This is illustrated with reference to case examples in which children conceived and born through ICS have had their Article 8 right endangered, and in some cases, violated. This Chapter makes clear that safeguarding the right to identity preservation must be treated as a matter of central importance for all children conceived and born through ICS.

Chapter 9 presents a case analysis of the landmark European Court of Human Rights judgments in *Mennesson v. France* and *Labassee v. France*. These cases are significant in the context of this study given they were the first judgments concerning ICS issued by a regional human rights court; furthermore, they warrant analysis as they indicate an approach to ICS emphasising the rights of the children involved. This Chapter examines the rights situation of the children concerned in the two cases, outlines the main arguments in the European Court of Human Rights and analyses the judgments of the Fifth Section of the Court. By taking a strong child-centred approach, the Court highlighted the vulnerability of children in ICS arrangements. Significantly,

the Court's judgments focus on the child's rights to nationality and identity; therefore, the discussion presented in the case analysis builds on the previous two chapters of this study, providing a further opportunity through which to view these rights of the child in the practical ICS context. This Chapter discusses the impact of these judgments in Europe and internationally, as Governments grapple with the complexities and impacts of ICS arrangements, particularly relating to the rights of children born through this new method of family formation. Although the Grand Chamber of the European Court of Human Rights has dealt with subsequent applications concerning ICS since passing the judgments this Chapter focuses on, the discussion presented in this Chapter provides insight into the reasoning of a judicial body grappling with ICS as a novel issue. However, to place the Court's jurisprudence concerning ICS in contemporary context, an Addendum to Chapter Nine is included, providing a brief analysis from a child rights perspective of the first ICS judgment of the Grand Chamber of the European Court of Human Rights, in the case of *Paradiso Campanelli v. Italy*.

Chapter 10 addresses the importance of rights balancing in ICS. As has been demonstrated throughout the preceding chapters of this study, due to the nature of ICS, this method of family formation often brings the rights and interests of the child into conflict with those of the other core parties to ICS arrangements. Chapter Ten brings these strands together, arguing that rights need to be balanced against each other in the ICS context, to establish the balance to be struck amongst competing rights and interests. This Chapter discusses the balancing of rights and interests of the child with those of other core parties to ICS: surrogate mothers, genetic donor parents and commissioning parents in ICS. It argues that rights balancing exercises will be necessary in relation to these core parties throughout the course of ICS arrangements, and that the child's rights and best interests should be accorded priority once born, given their particular stage in life and their vulnerability in comparison to the other core parties. In keeping with the preceding chapters in this study, while recognising the indivisible, interdependent and interrelated nature of children's rights, this Chapter draws attention to the child's rights most at risk in ICS, focusing on the need to respect the best interests of the child in all ICS situations. It proposes that along with this approach, the principle of human dignity must guide rights balancing in ICS, to strike an overall balance between the child's rights and best interests and the rights and interests of other core parties where necessary.

Chapter 11 serves as the overall conclusion to the thesis. It reiterates the complex and internationally unregulated nature of ICS and the fact that children are continuing to be born through ICS, and as a result, their rights are in some instances at risk. Chapter 11 traverses the ways in which the ICS landscape has changed over the course of the doctoral study, highlighting, for example, the supply-side states which have developed and closed down ICS markets through legislative reform or policy intervention, or which are in the process

of closing down ICS within their jurisdictions. It also draws attention to the various initiatives underway at the international level which have developed over recent years, seeking to bring public international human rights law standards and norms to bear in ICS, and to explore the potential for international agreement regarding ICS.

As well as placing the doctoral study in the current-day context, significantly, Chapter 11 distills the central findings of the thesis into a comprehensive framework of recommendations. These are drawn from and based on the preceding chapters of the thesis, presented in Chapter 11 as a 'Framework of recommendations for promoting and protecting the rights of children in International Commercial Surrogacy', proposed for use as a framework for a United Nations Committee on the Rights of the Child General Comment. The recommendations indicate practical steps to leverage existing international child rights standards and norms which would and could have a protective effect on the rights of the child in ICS if implemented, as well as minimising harm to children and their rights in the continuing practice of ICS. Some of the recommendations can be implemented on an immediate time-scale, and others over a longer time horizon, dependent on increased international agreement concerning ICS. Chapter 11 presents concluding remarks identifying future research opportunities from a child rights perspective in the ICS context, and discusses the prospects of reaching international consensus on ICS in the long-term. Finally, this concluding chapter of the doctoral study re-emphasises that as long as children continue being born through ICS, it is essential that CRC duty-bearers take decisions and actions that protect and promote the rights, best interests and inherent human dignity of all children who come into existence through ICS.

Samenvatting
Dutch summary

KINDERRECHTEN IN DE CONTEXT VAN INTERNATIONAAL COMMERCIEEL DRAAGMOEDERSCHAP
Een onderzoek naar de uitdagingen vanuit een international kinder- en mensenrechtenperspectief

Internationaal Commercieel Draagmoederschap (*International Commercial Surrogacy* – hierna ICS) heeft zich de afgelopen decennia gemanifesteerd als een nieuwe methode van gezinsvorming met een grensoverschrijdend karakter ontstaan vanuit een combinatie van een toenemende vraag van potentiële ouders enerzijds en voortschrijdende ontwikkelingen op medisch gebied in combinatie met verregaande globalisering anderzijds. ICS roept vragen op met betrekking tot de mensenrechten van de meest kwetsbare betrokkenen, namelijk de vrouwen die als draagmoeder optreden en de kinderen die als gevolg hiervan geboren worden. Er bestaat geen internationale consensus over ICS; dit blijkt uit de verschillende posities die staten hebben ingenomen met betrekking tot het al dan niet reguleren van ICS in hun nationale wetgeving en beleid. Bovendien is er geen regeling op internationaal niveau terwijl de kernpartijen in een ICS-traject uiteenlopende bedoelingen, rechten en belangen hebben. Als gevolg daarvan kunnen de rechten en belangen van de verschillende partijen met elkaar botsen.

ICS werpt complexe ethische, morele en juridische vragen op die tot nu toe grotendeels onbeantwoord zijn gebleven. Desalniettemin, worden er kinderen geboren door middel van ICS; kinderen die een verhoogd risico lopen op een schending van hun rechten. Alle ICS-trajecten draaien om de wens tot het krijgen van een kind. Net als ieder ander kind, heeft een kind dat via ICS geboren is, het recht om het hele scala aan rechten te genieten en uit te oefenen dat hem toekomt op grond van het Internationaal Verdrag inzake de Rechten van het Kind (IVRK). In de praktijk is het echter een grote uitdaging om de rechten van kinderen geboren door ICS te waarborgen en in sommige gevallen worden deze rechten dan ook geschonden. Daarom vormt ICS niet alleen een uitdaging vanuit de mensenrechten bezien, maar is er ook behoefte aan een kinderrechtenperspectief binnen het kader van de internationale mensenrechten.

Dit proefschrift bestaat uit een aantal artikelen dat is geschreven in een tijdsperiode waarin ICS zich razendsnel heeft ontwikkeld. De meerderheid van

de artikelen in dit proefschrift zijn reeds gepubliceerd (of liggen ter beoordeling voor) in tijdschriften en bundels. De artikelen in dit proefschrift vormen samen een uitgebreide verkenning van de kinderrechten die door ICS het meest onder druk komen te staan. Daarnaast bevat dit proefschrift praktische aanbevelingen op basis van het IVRK die gebruikt kunnen worden om deze kinderrechten te beschermen, te bevorderen en te waarborgen.

De hoofdvraag van dit onderzoek is de volgende:

Wat is de rol van internationale mensenrechten (in het bijzonder de normen en standaarden die in het IVRK zijn neergelegd) bij het beschermen en versterken van de rechten van kinderen in ICS en hoe moeten de rechten van deze kinderen worden verstaan en benaderd vanuit een internationaal kinder- en mensenrechtenperspectief in relatie tot de andere partijen en rechthebbenden?

Vervolgens worden de volgende onderzoeksvragen geanalyseerd:

- *Op wat voor manier vormt ICS een uitdaging voor kinderrechten?*
- *Welke kinderrechten staan het meest onder druk bij ICS?*
- *Hoe kunnen normen en standaarden uit het internationale mensenrechtenkader (in het bijzonder die welke zijn neergelegd in het IVRK) worden gebruikt om de rechten van kinderen in ICS situaties te beschermen?*
- *Hoe moeten de met elkaar botsende rechten en belangen van kinderen en anderen in ICS tegen elkaar worden afgewogen op een manier die in overeenstemming zijn met en gebaseerd zijn op de normen en standaarden van het internationaal mensenrechtenkader?*

Er is nog weinig wetenschappelijk onderzoek naar ICS voorhanden vanuit een kinderrechtenperspectief binnen het internationaal mensenrechtenkader; in dit onderzoek wordt gepoogd dat gat te dichten. Daarnaast zal in dit onderzoek worden getracht:

- de kwetsbaarheid van het kind en de manieren waarop kinderrechten onder druk staan in ICS inzichtelijk te maken;
- te laten zien hoe het internationaal mensenrechtenkader – in het bijzonder het IVRK – een beschermend kader kan bieden voor kinderen die zijn verwekt en geboren via ICS en hoe dit kan worden versterkt om zo te waarborgen dat deze kinderen hun IVRK-rechten kunnen genieten en uitoefenen, ongeacht het feit dat ze via ICS ter wereld zijn gekomen; en
- praktische voorstellen te doen hoe kinderen en hun rechten beter beschermd kunnen worden bij ICS.

Hoofdstuk 1 biedt een brede introductie op het onderwerp van dit proefschrift. Het zet de onderzoeksvragen uiteen, beschrijft de onderzoeksmethode en de reikwijdte van het onderzoek en plaatst het proefschrift binnen de huidige *state of the art* op dit onderzoeksgebied. Het hoofdstuk introduceert ICS als fenomeen, legt uit hoe het in de praktijk voorkomt, en legt uit waarom het

noodzakelijk is om de focus te leggen op kinderrechten in de context van ICS door de lens van de internationale mensenrechten bezien. Bovendien bevat het hoofdstuk een helder overzicht van de structuur en inhoud van het proefschrift.

Hoofdstuk 2 gaat in op de ontwikkeling van de ICS-markt en richt zich met name ook op de partijen wiens rechten en belangen onder druk staan in ICS, de 'kernpartijen' in een ICS-traject, namelijk het kind, de draagmoeder en de wensouders. De belangrijkste bio-ethische en morele uitdagingen van ICS worden kort besproken en bieden daarmee belangrijke achtergrondcontext voor de kinderrechten focus van dit proefschrift. Dit hoofdstuk is ook een voorbode van sommige van de problemen die door het bestaan van conflicterende rechten en belangen van de kernpartijen bij een ICS-traject worden veroorzaakt.

Hoofdstuk 3 zet de rechten van kinderen die worden verwekt en geboren via ICS en de rechten van de draagmoeder centraal. De primaire focus ligt op de rechten van de kinderen en de secondaire focus op de rechten van de draagmoeder. De meest essentiële uitdagingen voor kinderrechten in ICS worden aangewezen en besproken binnen de context van en met verwijzing naar de relevante bepalingen van het IVRK. Dit is de aanzet voor een completer beeld van de potentiële negatieve gevolgen voor kinderrechten bij ICS. Dit hoofdstuk bevat ook een overzicht van de meest in het oog springende potentiële mensenrechtenschendingen die betrekking hebben op de vrouwen in de context van ICS, en bespreekt een aantal van de mensenrechtenuitdagingen die zowel de kinderen als de draagmoeder betreffen in de ICS, namelijk het risico van commodificatie en mensenhandel. Hiermee wordt het bredere mensenrechtelijk kader waarin ICS plaatsvindt, belicht, waarmee ook de intersectionele aard van veel van de rechten en belangen die onder druk staan in ICS wordt benadrukt.

Hoofdstuk 4 laat de complexiteit zien van de moeder-kind relatie in de context van ICS en biedt een analyse van de manier waarop de rechten en belangen van het kind en die van zijn meerdere 'moeders' tegen elkaar kunnen worden afgewogen. Dit hoofdstuk belicht op unieke wijze een van de centrale relaties binnen alle ICS-trajecten, namelijk tussen het kind en de meerdere potentiële 'moeders'. Het bespreekt het construct van de 'moeder' als inherent verbonden aan 'kind', en analyseert de verschillende 'moeders' die bij ICS betrokken zijn: de draagmoeder (de enige met een moeder-foetus band door het dragen en het baren van het kind); de genetische moeder (de enige vrouw die door DNA met het kind verbonden is); en de wensmoeder (als er een vrouw bij het traject is betrokken, de vrouw of vrouwen die de het kind wil(len) opvoeden). Deze discussie laat ziet dat het bepalen van de status van de verschillende potentiële moeders zowel sociaal als juridisch ingewikkeld is. Hiermee legt het hoofdstuk de betwistbare aard van het concept 'moeder' in ICS bloot en legt de link met de bijbehorende implicaties voor de rechten van kinderen. De mogelijke belangen van elk van deze potentiële 'moeders' in ICS

ten opzichte van het kind worden bekeken en er wordt aandacht besteed aan de vraag hoe die rechten en belangen kunnen worden afgewogen tegen de rechten van het kind.

Hoofdstuk 5 gaat dieper in op de kinderrechten in het kader van ICS en ontwikkelt de idee van het kind als de *locus van kwetsbaarheid* in ICS-trajecten. Als onderdeel van deze analyse bevat dit hoofdstuk een uitgebreide bespreking van de ethische en economische aspecten van het vercommercialiseren van de conceptie van kinderen. Daarnaast worden de kinderrechten die het meest onder druk staan in de context van ICS nader belicht; het recht van het kind op nationaliteit en op behoud van identiteit, het recht om in een gezinsomgeving op te groeien, op onderwijs, gezondheid en sociale zekerheid. Dit hoofdstuk bespreekt ook ontwikkelingen in de jurisprudentie (door de analyse van rechterlijke uitspraken) en niet-juridische reacties (in het bijzonder nationale richtlijnen/richtlijnen uitgegeven door de overheid als een quasi-beleidsmatige benadering van ICS) in drie 'verzoekende' staten (Australië, Nieuw-Zeeland en het Verenigd Koninkrijk). Deze ontwikkelingen worden onderzocht in het licht van het kinderrechtenkader, om te bezien in hoeverre kinderrechten worden bevorderd, beschermd en nageleefd door deze juridische en niet-juridische reacties op ICS. Dit hoofdstuk laat zien dat een botsing tussen de rechten van het kind en de andere kernpartijen in ICS moeilijk te voorkomen is, maar dat een grotere inzet van maatregelen die de belangen en rechten van kinderen centraal plaatsen in de ICS-praktijk, zowel noodzakelijk als mogelijk is.

Hoofdstuk 6 zorgt dat er een holistische kijk op kinderrechten in ICS aan deze studie ten grondslag ligt door te overwegen hoe beslissingen en handelingen tijdens de fase voor de conceptie van het kind en tijdens de zwangerschap invloed kunnen hebben op de rechten van kinderen na hun geboorte via ICS. Sommige IVRK-rechten zullen inderdaad negatief worden beïnvloed door beslissingen die voor de conceptie van het kind zijn genomen. Dit hoofdstuk identificeert en bestudeert deze kinderrechtenuitdagingen die al voor de conceptie of tijdens zwangerschap kunnen ontstaan en stelt dat vanwege het internationale, geplande karakter van ICS en de betrokkenheid van meerdere potentiële ouders, er stappen genomen moeten worden om de rechten van het toekomstige kind zowel voor de conceptie als tijdens de zwangerschap te beschermen in alle ICS-trajecten. De analyse in dit hoofdstuk laat zien dat er geen internationale consensus bestaat met betrekking tot de rechtsbescherming van het ongeboren kind, zoals blijkt uit nationale jurisprudentie, regionale mensenrechteninstrumenten, nationale grondwetten en internationale mensenrechteninstrumenten. Het IVRK laat de mogelijkheid echter open om enige bescherming te verlenen voor de geboorte van een toekomstig kind; jurisprudentie laat ook zien dat het mogelijk is het kind enige bescherming te bieden voor de geboorte, zonder het daarbij rechten voor de geboorte toe te kennen. In dit hoofdstuk wordt een voorstel gedaan voor bescherming van de IVRK-rechten van het toekomstige kind voor de conceptie en de geboorte; dit voorstel

omvat drie basiswaarborgen die praktisch geïmplementeerd kunnen worden om zo te verzekeren dat kinderen hun IVRK-rechten ook kunnen genieten als ze via ICS geboren worden. Een veelheid aan actoren hebben hierin een rol te spelen en hun verschillende rollen worden in dit hoofdstuk besproken. Het gaat hierbij niet om het toekennen van rechten aan ongeboren kinderen, maar om het beschermen van potentiële rechten voorafgaand aan conceptie en geboorte, zodat het kind die rechten na de geboorte ook daadwerkelijk kan uitoefenen.

Hoofdstuk 7 analyseert één van de belangrijkste kinderrechtenuitdagingen in ICS: het waarborgen van het recht van het kind op nationaliteit onder artikel 7 IVRK. Kinderen die via ICS worden geboren, zijn soms stateloos en stranden in de staat van hun geboorte. Dit hoofdstuk bevat een overzicht van de rechten van het kind onder artikel 7 IVRK en bespreekt waarom en op welke manier staatloosheid zich kan voordoen in het kader van ICS. Uit jurisprudentie blijkt dat kinderen die via ICS zijn geboren soms maar moeilijk een nationaliteit kunnen verkrijgen, met name in de volgende drie ICS scenario's: a) wanneer het onmogelijk is voor een kind een nationaliteit te verwerven omdat het ouderschap van het kind niet wordt erkend; b) wanneer het nationaliteitsrecht van het geboorteland van het kind en van de staat van de nationaliteit van de wensouders elkaar tegenspreken; en c) wanneer een kind door de wensouders wordt achtergelaten in de geboortestaat. Het feit dat het recht van een kind op een nationaliteit samenhangt met andere IVRK rechten, wordt in dit hoofdstuk benadrukt. Bovendien wordt aandacht besteed aan de verschillende manieren waarop staten met dreigende staatloosheid van kinderen in ICS omgaan. Er wordt beargumenteerd dat het gebrek aan internationale consensus op het gebied van ICS geen barrière hoeft te vormen voor samenwerking tussen staten om staatloosheid van de betrokken kinderen te voorkomen. Op basis van bestaande internationale mensenrechtenstandaarden en kinderrechtenprincipes worden praktische oplossingen aangedragen om te voorkomen dat kinderen in de toekomst hun IVRK-recht op een nationaliteit niet kunnen uitoefenen. In het bijzonder wordt in hoofdstuk 7 voorgesteld om een internationale richtlijn op te stellen die weerspiegelt dat de staat van de van gewone verblijfplaats van de wensouders een nationaliteit moet verlenen aan het kind indien dit anders stateloos zou zijn op voorwaarde dat er een genetische band bestaat tussen het kind en minstens één van de wensouders. Daarnaast zou een dergelijke richtlijn moeten weerspiegelen dat staten een nationaliteit verlenen aan een kind dat via ICS op hun grondgebied is geboren als dit kind anders stateloos zou zijn.

Hoofdstuk 8 richt zich op het recht van het kind op het behoud van identiteit zoals neergelegd in artikel 8 IVRK, in de context van ICS. Net als het recht op nationaliteit, is het recht op behoud van identiteit één van de rechten die het meest onder druk staat in de context van ICS en vormt daarmee het hart van de kinderrechtenuitdaging die uit ICS voortvloeit, gegeven de levenslange gevolgen voor het kind van schending van dit recht. Alhoewel nationaliteit

een element is van de identiteit van een kind, is het slechts een van de vele elementen in dit opzicht. Daarom worden in dit hoofdstuk de andere elementen van identiteit die in ICS onder druk staan geïdentificeerd (genetisch en biologisch identiteit (waaronder het recht op gezondheid van het kind); persoonlijke geschiedenis; en culturele identiteit). Daarnaast wordt ook gekeken waarom het behoud van identiteit zo belangrijk is in de context van ICS. Deze discussie is gegrond op artikel 8 IVRK en regionale mensenrechtenjurisprudentie, maar trekt ook lering uit kennis over adoptie, donorconceptie en nationaal draagmoederschap. Het centrale argument dat in dit hoofdstuk naar voren wordt gebracht, is dat het kinderrecht van artikel 8 IVRK op een proactieve en solide manier moet worden beschermd in ICS, in het bijzonder door de wensouders, medici, draagmoederschapsklinieken en staten, om te waarborgen dat kinderen de genetische, biologische en culturele elementen van hun identiteit en hun persoonlijke geschiedenis kunnen behouden. Hoofdstuk 8 maakt duidelijk dat het niet beschermen van dit recht, levenslange gevolgen voor het kind zal hebben. Dit wordt geïllustreerd aan de hand van voorbeelden waarin de artikel 8 rechten van kinderen die via ICS zijn verwekt en geboren in gevaar zijn gebracht en in sommige gevallen zelfs zijn geschonden. Uit dit hoofdstuk blijkt dat het waarborgen van het recht op behoud van identiteit van wezenlijk belang is voor alle kinderen die via ICS ter wereld komen.

Hoofdstuk 9 bevat een analyse van de baanbrekende uitspraken van het Europese Hof voor de Rechten van de Mens in de zaken *Mennesson v. France* en *Labassee v. France*. Deze zaken zijn belangrijk voor deze studie omdat het de eerste uitspraken zijn over draagmoederschap van een regionaal mensenrechtenhof; bovendien zijn ze belangrijk omdat ze het begin lijken te zijn van een benadering van ICS waarbij de rechten van de berokken kinderen centraal staan. In dit hoofdstuk worden deze twee zaken geanalyseerd, de hoofdargumenten van het EHRM uiteengezet en wordt een analyse gemaakt van deze uitspraken. Door een sterke kinderrechtengerichte benadering, benadrukt het EHRM de kwetsbaarheid van kinderen die zijn geboren uit ICS-trajecten. De uitspraken van het EHRM zijn gefocust op nationaliteit en identiteit, daarom bouwt de discussie in dit hoofdstuk voort op de twee vorige hoofdstukken en biedt daarmee een mogelijkheid om de rechten van het kind in de alledaagse praktijk van ICS te beschouwen. Dit hoofdstuk bespreekt de impact van deze beslissingen op Europees en op internationaal niveau, in een wereld waarin overheden worstelen met de complexiteit en de gevolgen van ICS-trajecten, in het bijzonder waar het de rechten van kinderen in deze situaties betreft. Alhoewel de Grote Kamer van het EHRM sindsdien andere zaken met betrekking tot ICS heeft behandeld, geeft dit hoofdstuk inzicht in de redeneringen van een gerechtelijke instantie die met ICS worstelt als een nieuw fenomeen. Om deze uitspraken in de context van vandaag de dag te plaatsen, bevat het hoofdstuk een Addendum waarin de zaak *Paradiso Campanelli v. Italy* uitgebreid wordt besproken.

In *Hoofdstuk 10* staat het belang van een belangenafweging in ICS centraal. Zoals in voorgaande hoofdstukken is aangetoond, komen de rechten en belangen van kinderen in ICS, door de aard van deze manier van gezinsvorming, vaak in conflict met die van de andere kernpartijen bij een ICS-traject. In hoofdstuk 10 komen deze verschillende lijnen samen, en wordt gesteld dat de rechten tegen elkaar moeten worden afgewogen in de context van ICS om tot een balans te komen tussen de rechten en belangen van het kind en die van de ander kernpartijen bij ICS: draagmoeders, eicel- en spermadonoren en de wensouders. Dit balanceren van rechten van de verschillende kernpartijen moet tijdens het hele ICS traject plaatsvinden, waarbij zodra het kind geboren is de rechten en belangen van het kind prioriteit moeten hebben, gezien zijn levensstadium en kwetsbaarheid vergeleken met de andere kernpartijen. Net als in de vorige hoofdstukken, wordt hier vooral aandacht besteedt aan de kinderrechten die het meest onder druk staan in ICS, zonder daarbij de ondeelbare, onderling afhankelijke en vervlochten aard van kinderrechten te miskennen, met focus op de noodzaak de rechten van kinderen in alle ICS situaties te respecteren. In dit hoofdstuk wordt voorgesteld om, naast deze benadering, het principe van menselijke waardigheid te gebruiken als leidraad voor het wegen. Hierdoor kan, , waar nodig, een volledige afweging worden gemaakt van de belangen en rechten van kinderen enerzijds en de belangen en rechten van andere kernpartijen anderzijds.

Hoofdstuk 11 dient als de algemene conclusie van het proefschrift. Het benadrukt nogmaals de complexe aard van ICS en het gebrek aan internationale regelgeving en het feit dat kinderen desalniettemin via ICS geboren worden en daardoor het risico lopen dat hun rechten worden geschonden. Het hoofdstuk bevat een dwarsdoorsnede van de veranderingen die tijdens het schrijven van dit proefschrift op het gebied van ICS hebben plaatsgevonden. Zo is er bijvoorbeeld aandacht voor aanbodstaten die toegang hun groeiende ICS markt al hebben geblokkeerd door middel van wetgeving of beleidsinterventies of daarmee bezig zijn. Ook is er aandacht voor internationale initiatieven die zich de afgelopen jaren hebben ontwikkeld om internationale mensenrechten en normen een plek te geven binnen ICS, en de mogelijkheden voor internationale overeenstemming met betrekking tot ICS te onderzoeken.

Dit afsluitende hoofdstuk plaatst het proefschrift niet alleen in een hedendaagse context, maar zet daarnaast de centrale conclusies van dit onderzoek om in een breed raamwerk van aanbevelingen. Deze aanbevelingen komen voort uit en zijn gebaseerd op de eerdere hoofdstukken in dit proefschrift en worden gepresenteerd als een 'Framework of recommendations for promoting and protecting the rights of children in International Commercial Surrogacy'. Ze kunnen dienen als een raamwerk voor een *General Comment* van het Kinderrechtencomité van de Verenigde Naties. De aanbevelingen bevatten praktische stappen die ondernomen kunnen worden om bestaande internationale kinderrechtenstandaarden en -normen te verstevigen, om zo de rechten van kinderen beter te beschermen bij de mogelijke implementatie van ICS, waardoor schade

aan kinderen en hun rechten in de praktijk van ICS zou kunnen worden geminimaliseerd. Sommige van de aanbevelingen kunnen direct worden geïmplementeerd, en andere over een langere tijdspanne, afhankelijk van de toenemende internationale overeenstemming over ICS. Daarnaast worden in dit hoofdstuk nieuwe onderzoeksvragen voor toekomstig onderzoek naar kinderrechten in de context van ICS geïdentificeerd en worden mogelijkheden voor internationale consensus met betrekking tot ICS op lange termijn besproken. Ten slotte benadrukt dit afsluitende hoofdstuk dat zo lang er kinderen via ICS worden geboren, het van het grootste belang is dat de plichtendragers op grond van het IVRK beslissingen nemen die de rechten, belangen en de inherente menselijke waardigheid beschermen en bevorderen van alle kinderen die via ICS ter wereld komen.

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Curriculum vitae

Claire Achmad (Auckland, New Zealand, 1983) is a human rights lawyer specialising in children's rights law and policy. She obtained her Bachelor of Laws and Bachelor of Arts (Political Studies major) degrees from the University of Auckland, New Zealand. During the course of her Bachelor of Laws degree, she studied on an international exchange programme at the Faculty of Law, Copenhagen University, Denmark. Claire was admitted as a Barrister and Solicitor of the High Court of New Zealand in 2007. In 2010 she was named the recipient of the CLANZ-Bell Gully New Zealand Young Corporate Lawyer of the Year Award. Later in 2010 she was awarded a Rotary Global Grant Scholarship to study at Leiden University, and she obtained her Master of Laws (*cum laude*) in Advanced Studies in Public International Law (Peace, Justice and Development specialisation) in 2011, through Leiden Law School and the Grotius Centre for International Legal Studies, Leiden University. She obtained a Certificate of Proficiency in the subject 'Torture and Disappearances in International Human Rights Law and Practice' from the Law School of the University of Auckland in 2016.

Claire practiced as a solicitor within the National Legal Services of the New Zealand Ministry of Social Development from 2007 to 2010, first as a Graduate Solicitor and later as the Ministry's Human Rights and Litigation Solicitor. During this time, she also worked probono as a Solicitor at the Wellington Community Law Centre (Refugee and Immigration Legal Advice Service). She worked in the Child Rights and Advocacy Team of UNICEF Nederland from 2010 to 2011, leading work on the rights of unaccompanied minor asylum seekers in the Netherlands and Europe and advocating for the disestablishment of Dutch and European policies of forced return of separated children to countries of origin. In 2012 Claire took up the post of Senior Advisor to the Chief Human Rights Commissioner and Executive Director at the New Zealand Human Rights Commission, where she worked until 2014. Claire has worked as an international human rights and child rights consultant for a number of organisations and eminent jurists, including KidsRights, Judge Rosalyn Higgins, DBE QC (former President of the International Court of Justice), and Maud de Boer-Buqicchio (United Nations Special Rapporteur on the sale and sexual exploitation of children). She was the Senior Policy Advisor, Child Rights at World Vision Australia from 2016 to 2017, and since 2017 is employed by Barnardos, New Zealand's leading children's charity, where she is the

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Claire is a Core Group member of the International Expert Group convened by the International Social Service to draft principles for better protection of children in international surrogacy arrangements. She is a member of the Asia New Zealand Leadership Network, currently serves as a Director and Trustee of ShelterBox New Zealand, a Steering Committee member of Action for Children and Youth Aotearoa and a member of the Children's Convention Monitoring Group. She has taught international human rights and children's rights law as a Visiting Lecturer at both Leiden University and the University of Auckland, and has presented on international children's rights law topics at universities, conferences and workshops around the world.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2017 and 2018

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E.M. MEIJERS INSTITUUT

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International Commercial Surrogacy (ICS) has emerged over the past decade as a modern method of family formation. ICS is unregulated internationally and domestic laws are struggling to keep pace with ICS. However, a child is at the centre of every ICS arrangement, and children conceived and born through ICS are at a heightened risk of their rights being infringed.

Comprised of a collection of articles written over the course of time when ICS has been rapidly developing, this book explores why and how the child's rights are at risk in ICS, and seeks to apply the standards and norms of the United Nations Convention on the Rights of the Child to the ICS context. This book proposes approaches for balancing the competing rights and interests of the child and other parties in ICS. It presents a framework for protecting the rights of children born through ICS, illustrating that this is achievable in practice, in the absence of international consensus on ICS as a phenomenon.

This book is relevant for child rights practitioners and academics, and useful for policy-makers, legislators and national and international decision-makers grappling with the children's and human rights issues presented by this 21st century human rights challenge.

This is a volume in the series of the Meijers Research Institute and Graduate School of the Leiden Law School of Leiden University. This study is part of the Law School's research programme 'Effective protection of fundamental rights in a pluralist world'.

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